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TITLE IX

TITLE IX LEGAL MANUAL

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GENERAL INFORMATION
OFFICE OF THE ASSISTANT ATTORNEY GENERAL

LEADERSHIP

Kristen Clarke

Assistant Attorney General

CONTACT

Civil Rights Division

(202) 514-3847
Telephone Device for the Deaf
(TTY) (202) 514-0716

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Title IX Cover Addendum post-Bostock

Editor’s Note:

Since the attached Title IX Legal Manual was issued in 2001, sex discrimination jurisprudence has developed significantly. Notably, on June 15, 2020, the Supreme Court held in *Bostock v. Clayton County* that sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. (Title VII) encompasses discrimination on the basis of sexual orientation and transgender status. 140 S. Ct. 1731, 1741, 590 U.S. ___, ___ (2020).

Though Title VII and Title IX are two distinct statutes, their statutory prohibitions against sex discrimination are similar, such that Title VII jurisprudence is frequently used as a guide to inform Title IX. *See* Manual, Chapters I, IV. Indeed, in the months following the *Bostock* decision, several federal courts have reached the same conclusion as to Title IX, holding that Title IX protects transgender students from discrimination on the basis of gender identity. *See, e.g.*, *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020) (“Although *Bostock* interprets [Title VII], it guides our evaluation of claims under Title IX.”), *as amended* (Aug. 28, 2020), *reh’g en banc denied*, 976 F. 3d 399 (4th Cir. 2020), *cert. denied*, No. 20-1163 (June 28, 2021); *B.P.J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021); *Koenke v. Saint Joseph's Univ.*, No. CV 19-4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe v. Univ. of Scranton*, No. 3:19-CV-01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020). Other circuits reached this conclusion before *Bostock*, relying on their own Title VII jurisprudence. *See Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017) (transgender boy was likely to succeed on his claim that school district violated Title IX by excluding him from the boys’ restroom); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016) (*per curiam*) (school district that sought to exclude transgender girl from girls’ restroom was not likely to succeed on the claim because Title IX prohibits discrimination based on sex stereotyping and gender nonconformity).

On March 26, 2021, the Principal Deputy Assistant Attorney General for the Civil Rights Division issued a memorandum to federal civil rights offices and general counsels addressing the application of *Bostock* to Title IX, determining that Title IX's prohibition on discrimination "on the basis of sex" includes discrimination on the basis of gender identity and sexual orientation. *See* Letter from Pamela S. Karlan, Principal Deputy Assistant Attorney General for the Civil Rights Division, to Federal Civil Rights Directors and General Counsels (Mar. 26, 2021), www.justice.gov/crt/page/file/1383026/download. On June 22, 2021, the U.S. Department of Education issued a notice of interpretation clarifying that "[c]onsistent with the Supreme Court's ruling and analysis in *Bostock*, the Department [of Education] interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity." Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32,637 (June 22, 2021). *See also* Letter from Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights at the Department of Education, to Educators (June 23, 2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.

The reasoning in these interpretations applies with equal force to discrimination against intersex people. "Intersex" refers to people born with variations in physical sex characteristics—including genitals, gonads, chromosomes, and hormonal factors—that do not fit typical definitions of male or female bodies. The *Bostock* Court addressed discrimination against "persons with one sex identified at birth and another today." 140 S. Ct. at 1747. Discrimination against intersex individuals is similarly motivated by perceived differences between an individual's specific sex characteristics and their sex category (either as identified at birth or some subsequent time). Additionally, discrimination based on anatomical or physiological sex characteristics (such as genitals, gonads, chromosomes, and hormone function) is inherently sex-based. Intersex traits, like gender identity and sexual orientation, are "inextricably bound up with" sex. *See id.* at 1742. In other words, it is impossible to discuss intersex status without also referring to sex. *Cf. Grimm*, 972 F.3d at 609. Lastly, discrimination based on intersex traits may also involve sex stereotypes, as intersex people by definition have traits that do not conform to stereotypes about male or female bodies. *Cf. Whitaker*, 858 F.3d at 1048 ("[A] transgender individual does not conform to the sex-based stereotypes of the sex that [they were] assigned at birth.")

While this Manual is not intended to provide a complete, comprehensive directory of all cases or issues related to Title IX, these important developments are highlighted here to clarify the Department's position that Title IX's prohibition on sex discrimination includes discrimination based on gender identity, intersex traits, and sexual orientation.

Introduction

This Manual provides an overview of the legal principles of Title IX of the Education Amendments of 1972, 20 U.S.C. ï½§1681 et seq. It is intended to be an abstract of general principles and issues for use by various federal agencies charged with enforcing Title IX and is not intended to provide a complete, comprehensive directory of all cases or issues related to Title IX. In addition, this document is not intended to be a guide for Title IX enforcement with respect to traditional educational institutions such as colleges, universities, and elementary and secondary schools, which have been subject to the Department of Educations Title IX regulations and guidance for 25 years. Rather, this Manual is intended to provide guidance to federal agencies concerning the wide variety of other education programs and activities operated by recipients of federal financial assistance. Such programs, many of which first became subject to Title IX regulations when the Title IX final common rule became effective on September 29, 2000, may include police academies, job training programs, vocational training for prison inmates, and other education programs operated by recipients of federal assistance.

For more specific information on Title IX as it relates to educational institutions, readers should consult the various documents written and published by the Department of Education, Office for Civil Rights that can be found on the Department of Education website. Documents which may be consulted include: *Proposed Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* 65 Fed. Reg. 66092 (2000) (the final Sexual Harassment Guidance is anticipated for a January 2001 publication); *Policy Interpretation-Title IX and Intercollegiate Athletics*, 45 C.F.R. Part 26 (1979); *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, dated January 16, 1996; *Guidance on the Awarding of Athletic Financial Assistance (OCR letter to Bowling Green, July 23, 1998),* as well as various other pamphlets, memoranda, and documents. This Manual is in no way intended to supersede any guidance issued by the Department of Education, and, to the extent that this Manual is construed to conflict with guidance issued by the Department of Education regarding traditional educational institutions, the Department of Educations Guidance should be followed.

Moreover, since this Manual is not designed to address Title IX enforcement with respect to traditional educational institutions, a number of subjects that pertain primarily to schools, such as athletics, are not addressed in depth. However, the vast majority of Title IX cases do involve educational institutions and so, of course, the Manual cites extensively to those cases in identifying applicable legal principles. Although this Manual generally cites to cases interpreting Title IX, cases interpreting Titles VI and VII of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973 are also included. While statutory interpretation of these laws overlap, they are not fully consistent, and this document should not be considered to be an overview of any statute other than Title IX. Although this Manual is intended primarily for federal agency investigators use, it includes discussion of many cases involving individual Title IX lawsuits. It is important for federal agencies to remember that the standard for a Federal agency to determine whether a recipient has violated Title IX differs from the higher liability standard of proof that must be met in a court action before compensatory damages are awarded. Recipients have an affirmative duty to correct Title IX violations even if no monetary damages would be awarded because of the violation.

It is intended that this manual will be updated periodically to reflect significant changes in the law. Comments on this publication, and suggestions as to future updates, including published and unpublished cases, may be addressed to:

Federal Coordination and Compliance Section
Civil Rights Division
U.S. Department of Justice
Attention: Title IX Legal Manual Coordinator
P.O. Box 66560
Washington, D.C. 20035-6560

Telephone and TDD (202) 307-2222
FAX (202) 307-0595
E-mail COR.CRT@USDOJ.GOV

This Manual is intended only to provide guidance on general principles related to Title IX enforcement outside the context of traditional educational institutions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States.

I. Overview of Title IX: Interplay with Title VI, Section 504, Title VII, and the Fourteenth Amendment

In June 1972, President Nixon signed Title IX of the Education Amendments of 1972 into law. Title IX is a comprehensive federal law that has removed many barriers that once prevented people, on the basis of sex, from participating in educational opportunities and careers of their choice. It states that:

No person in the United States shall, on the basis of sex, be excluded from participation, in be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. ï½§ 1681, et seq. Title IX applies to all aspects of education programs or activities operated by recipients of federal financial assistance.[1] In addition to educational institutions such as colleges, universities, and elementary and secondary schools, Title IX also applies to any education or training program operated by a recipient of federal financial assistance. For example, Title IX would cover such diverse activities as a forestry workshop run by a state park receiving funds from the Department of Interior; a boater education program sponsored by a county parks and recreation department receiving funding from the Coast Guard; a local course concerning how to start a small business, sponsored by the state department of labor that receives funding from the Small Business Administration; state and local courses funded by the Federal Emergency Management Agency in planning how to deal with disasters; and vocational training for inmates in prisons receiving assistance from the Department of Justice (hereinafter referred to as "DOJ" or "Justice Department" or "the Department"). Generally, it covers all aspects of the education program, including admissions, treatment of participants, and employment. Title IX guarantees equal educational opportunity in federally funded programs.

Congress consciously modeled Title IX on Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. ï½§ 2000d et seq., which prohibits discrimination on the basis of race, color, or national origin in programs or activities that receive federal funds. Note that Title VIs protections are not limited to "education" programs and activities, as are those of Title IX.

The two statutes both condition an offer of federal funding on a promise by the recipient not to discriminate, in what is essentially a contract between the government and the recipient of funds. Because of this close connection between the statutes, Title VI legal precedent provides some important guidance for the application of Title IX. See, *e.g.,* Cannon v. University of Chicago, 441 U.S. 677, 694-98 (1979)(Congress intended that Title IX would be interpreted and applied as Title VI has been). Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in federally funded programs, was also modeled after Title VI and, hence, may also provide guidance for an analysis of Title IX. See Alexander v. Choate, 469 U.S. 287, 294 (1985)(Because Title IX, Section 504, and Title VI contain parallel language, the same analytic framework should generally apply in cases under all three statutes). These statutes were enacted to prevent unlawful discrimination and to provide remedies for the effects of past discrimination.

Although much of Title VI case law can be applied to Title IX situations, the analogy is not perfect because Title IX contains several important exemptions that are absent in Title VI. For example, with regard to single-sex admissions policies, Title IXs prohibitions against sex discrimination apply only to vocational, professional, graduate, and public undergraduate schools (except for those public institutions of undergraduate higher education that traditionally and continually from their establishment have had a policy of admitting only students of one sex).[2] Title IX does not cover the single-sex admissions policies of elementary, secondary, (other than vocational schools), or private undergraduate schools.

Additional Title IX exemptions include the membership policies of certain university-based social fraternities and sororities, the Girl and Boy Scouts, the YMCA and YWCA, the Camp Fire Girls and certain other voluntary single-sex and tax-exempt youth service organizations whose members are chiefly under age 19.

Also exempt are any programs or activities of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; and any program or activity of a secondary school or educational institution specifically for the promotion of any Boys State conference, Boys Nation conference or the selection of students to attend any such conference. Further, Title IX does not apply to father-son or mother-daughter activities at an educational institution - but if such activities are provided for students of one sex, reasonably comparable opportunities much be provided for members of the other sex. Finally, any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant is exempt provided the pageant complies with other nondiscrimination provisions of federal law.

Title IX exempts from coverage any educational operation of an entity that is controlled by a religious organization only to the extent Title IX would be inconsistent with the religious tenets of the organization.[3] For example, Title IX would not require a religiously controlled organization that trains students for the ministry to offer such training to women if the organizations religious tenets hold that all ministers must be men. Title IX also exempts institutions that train individuals for the military or the merchant marine.

In addition to the statutory exemptions discussed above, the Title IX common rule contains a few other exceptions permitting single-sex programs under certain limited circumstances. For example, section ____.110(a)requires appropriate remedial action if a designated agency official finds that a recipient has discriminated against persons on the basis of sex. In the absence of a finding of discrimination, section ____.110(b) permits affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation in a program by persons of a particular sex. Either of these provisions could permit single-sex programs under appropriate circumstances. In addition, several other regulatory provisions permit single-sex programs: section ____.415(b)(5) permits portions of education programs or activities that deal exclusively with human sexuality to be conducted in separate sessions for boys and girls; section ____.445(b) permits a program offered to pregnant students on a voluntary basis that is comparable to that offered to non-pregnant students; sections ____.414(b)(2) and (6) permit recipients to make requirements based on objective standards of physical ability or of vocal range or quality; and section ___ .415(b)(3) permits separation by sex in physical education classes involving contact sports. In addition, section 420(b) permits exclusion, on the basis of sex, of any person from admission to a nonvocational school operated by a local education agency, so long as "...such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools." [4]

It is important to note that even though Title IX carves out the above exceptions to its general prohibition on sex discrimination, governmental/public recipients may still have a constitutional duty not to discriminate on the basis of sex. Under the Equal Protection Clause of the Fourteenth Amendment, a governmental classification based on sex can be lawful only if the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724(1982)(nursing school could not justify excluding male applicants; policy violated the Fourteenth Amendment notwithstanding Title IX exemption, quoting, Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)). For example, even though Title IX may not prohibit a traditionally single-sex public entity providing training for nurses from excluding male applicants, the public entity must still demonstrate an "exceedingly persuasive justification" for the restrictive admission policy in order to survive an equal protection challenge. Id. at 724 (citing, Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)). See also United States v. Virginia, 518 U.S. 515 (1996)(U.S. Department of Justice successfully challenged military schools male-only admissions policy under Title IV of the Civil Rights Act.

The Title IX regulations contain a variety of procedural requirements, the most important of which is the requirement to establish grievance procedures. The regulations require that every recipient to which Title IX applies "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that be prohibited by these Title IX regulations." ï½§ ____.135. These grievance procedures are an essential element in ensuring that Title IX and its implementing regulations are complied with in the least contentious manner possible.[5]

Unlike Title VI which covers employment only in limited circumstances, Title IX clearly covers employment discrimination. Title IXs availability as an independent basis to attack discriminatory employment practices does not mean, however, that its analytical and evaluative methodology is divorced from that used under Title VII of the Civil Rights Act of 1964. Rather, like Title VI, Title IX borrows heavily from Title VII in its theory and approach to sex-based employment discrimination. It is generally accepted outside the sexual harassment context that the substantive standards and policies developed under Title VII apply with equal force to employment actions brought under Title IX. By contrast, however, it is generally held that Title IX does not incorporate the procedural requirements of Title VII. For a more detailed discussion of the relationship between Title IX and Title VII, see Chapter IV(b) of this Manual. Section 5 of that chapter discusses the joint rule issued by the Department of Justice and the Equal Employment Opportunity Commission, which sets forth procedures that federal agencies are to utilize when processing Title IX employment cases.

II. Synopsis of Purpose of Title IX, Legislative History, and Regulations

1. Purpose

Congress enacted Title IX with two principal objectives in mind: to avoid the use of federal resources to support discriminatory practices in education programs, and to provide individual citizens effective protection against those practices.See Cannon v. University of Chicago, 441 U.S. 677, 704 (1979).

2. Legislative History

As the womens civil rights movement gained momentum in the late 1960's and early 1970's, sex bias and discrimination in schools emerged as a major public policy concern. Women, who were entering the workforce in record numbers, faced a persistent earnings gap compared to their male counterparts. As a consequence of the equality in the workforce debate, Americans also began to focus attention generally on inequities that inhibited the progress of women and girls in education. Several advocacy groups filed class action lawsuits against colleges and universities and the federal government. These advocacy organizations complained of an industry-wide pattern of sex bias against women who worked in colleges and universities. As a consequence, Congress focused on the issue of sex bias in education during the summer of 1970 at a set of hearings on discrimination against women before a special House Subcommittee on Education chaired by Representative Edith Green (Oregon). Representative Green introduced a higher education bill with provisions regarding sex equity wherein she unsuccessfully attempted to add a prohibition on sex discrimination to the Education Amendments of 1971.

A year later, Title IX began its congressional life in earnest when an amendment was introduced in the Senate by Senator Birch Bayh of Indiana, who explained that its purpose was to combat "the continuation of corrosive and unjustified discrimination against women in the American educational system." 118 Cong. Rec. 5803 (1972). During debate, Senator Bayh stressed the fact that economic inequities suffered by women can often be traced to educational inequities. In support of the amendment, Senator Bayh pointed to the link between discrimination in education and subsequent employment opportunities:

The field of education is just one of many areas where differential treatment [between men and women] has been documented but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.

Id. at 5806-07. Senator Bayh decried the "sex discrimination that reaches into all facets of education admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales." Id. at 5803 (1972).

Congressional activity on the issue increased with the introduction of various proposals in the House and Senate to end sex discrimination in education. Although there was growing consensus that sex discrimination in education should end, there was little agreement as to the best methods for reaching that goal. Some critics claimed that the legislation was intended to try to maintain a certain quota or ratio of male to female students. Senator Bayh reiterated many times during the debate that "the amendment is not designed to require specific quotas. The thrust of the amendment is to do away with every quota." 117 Cong. Rec. 30,409 (1971). The Senator went on to state that, "The language of my amendment does not require reverse discrimination. It only requires that each individual be judged on merit, without regard to sex." Id.

Even with Senator Bayhs repeated assurances against quotas, it took a House-Senate Conference Committee several months to iron out the differences between the House and Senate education bills. In the end, the House attached a floor amendment to the bill specifying that the legislation would not require quotas.[6] The newly clarified legislation was enacted as Title IX of the Education Amendments Act of 1972, 20 U.S.C.A. ï½§ 1681, et seq., on June 23, 1972.

Despite this lengthy process, Title IX was passed without much debate as to several of its key exemption provisions. For example, early on it was unclear whether Congress intended to regulate intercollegiate athletics. For this reason, the statute was amended in 1974 to direct the Department of Health Education and Welfare to publish proposed implementing regulations, with a provision stating that such regulations shall include with respect to intercollegiate athletic activities, reasonable provisions considering the nature of the particular sports.[7]

In 1988 Congress enacted the CRRA to restore the broad interpretation accorded the phrase "program or activity" prior to the Supreme Courts decision in Grove City College V. Bell, 465 U.S. 555 (1984)[8]. The CRRA amends Title IX and other related nondiscrimination statutes to afford broad coverage to all of the operations of a recipient (although Title IXs prohibition against sex discrimination applies only in a recipients "education" programs). The CRRA clarifies the definition of "program or activity" or "program." The scope of coverage is no longer limited to the exact purpose or nature of the federal funding. For example, if a State prison receives federal financial assistance, all the operations of the State Department of Corrections are covered by Title VI and Section 504, and all the departments education and training programs are covered by Title IX. Moreover, it is well established that, when a recipient is an educational institution, all of the institutions operations are covered by Title IXs antidiscrimination provisions. See Chapter III(C) for a more detailed discussion of these concepts.

Moreover, it also should be noted that, consistent with the CRRAs purpose of achieving broad, institution-wide coverage of a federal funding recipients program or activity, there is no requirement that federal funds be extended directly to an "educational" portion of a recipients program in order to trigger coverage under Title IX. Rather, any federal financial assistance subjects a recipients entire program or activity to coverage under all four civil rights statutes, but Title IXs prohibition on sex-based discrimination applies only to the educational components of a recipients program. For example, in the hypothetical described above, federal funds distributed to a Department of Corrections for a non-educational operation such as the provision of medical services would subject all of the Departments educational operations to coverage under Title IX.

The CRRA also amended Title IX to incorporate an "abortion neutrality" provision commonly referred to as the Danforth Amendment, which provides:

Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or services, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion. 20 U.S.C. ï½§1688.

Consistent with the Danforth Amendment, the Title IX common rule does not require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. However, medical procedures, benefits, services, and the use of facilities, necessary to save the life of a pregnant woman or to address complications related to an abortion are not subject to this section. 65 Fed. Reg. 52869 (2000) (Section ___.235(d)(1)). Moreover, the Title IX common rule prohibits a recipient from discriminating against, excluding, or denying benefits to a person because that person has obtained, sought, or will seek an abortion. This prohibition applies to any service or benefit for an applicant (for enrollment or employment), student, or employee. 65 Fed. Reg. 52869 (2000) (Section ___.235(d)(2)).

In addition, the CRRA expanded the exemption for entities controlled by religious organizations. Under the CRRA, the exemption is no longer limited to *educational institutions* that are controlled by religious organizations with tenets contrary to Title IX. Instead, any educational operation of an entity may be exempt from Title IX due to control by a religious organization with tenets that are not consistent with the provisions of Title IX. Further, the exemption would apply to a particular education program operated by a recipient if this separate program is subject to religious tenets that are not consistent with Title IX.

As in the Department of Education Title IX regulations, the Title IX common rule provides:

An educational institution or other entity that wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

Section ____.205(b). The preamble to the Notice of Proposed Rulemaking of the Title IX common rule explains that if a recipient has already obtained an exemption from the Department of Education, such exemption may be submitted to another funding agency as a basis for an exemption from the second funding agency. 64 Fed. Reg. 58570 (1999).

3. Regulations

Title IX requires that agencies promulgate regulations to provide guidance to recipients of federal financial assistance who administer education programs or activities on Title IX enforcement. After the passage of Title IX, the Department of Health, Education, and Welfare (HEW) adopted implementing regulations. 40 Fed. Reg. 24128 (1975). When HEW split in 1980 into two departments, the Department of Education and the Department of Health and Human Services, each new agency adopted the regulations. See 34 C.F.R. Part 106 and 45 C.F.R. Part 86, respectively. Two other federal agencies, the Department of Agriculture and the Department of Energy, also published Title IX rules around that same time.[9]

On October 29, 1999 the Department of Justice and 23 other agencies published a Notice of Proposed Rulemaking to implement Title IX. See 64 Fed. Reg. 58567 (1999). In the Title IX common rule, the substantive nondiscrimination obligations of recipients, for the most part, are identical to those established by the Department of Education under Title IX. However, the rule reflects statutory changes to Title IX, such as those resulting from passage of the CRRA, and modifications to ensure consistency with Supreme Court precedent. After receiving and reviewing comments, and making a few additional changes to the regulations in response to these comments, the Department of Justice and 20 other participating agencies published the final Title IX common rule on August 30, 2000.[10] See 65 Fed. Reg. 52857 (2000).

III. Scope of Coverage

A. Federal Financial Assistance

Title IX prohibits, with certain exceptions, any entity that receives "federal financial assistance" from discriminating against individuals on the basis of sex in education programs or activities.[11] The clearest example of federal financial assistance is the award or grant of money. However, federal financial assistance may also be in nonmonetary form. See United States Dept of Transp. v. Paralyzed Veterans, 477 U.S. 597, 607 n.11 (1986). As discussed below, federal financial assistance may include the use or rent of federal land or property at below market value, federal training, a loan of federal personnel, subsidies, and other arrangements with the intention of providing assistance. Federal financial assistance does not encompass contracts of guarantee or insurance by the federal government. It is also important to remember that not only must an entity receive federal financial assistance to be subject to Title IX, but the entity also must receive federal assistance at the time of the alleged discriminatory act(s) except for assistance provided in the form of real or personal property. In this situation, the recipient is subject to Title XI for as long as it uses the property. See Huber v. Howard County, Md., 849 F. Supp. 407, 415 (D. Md. 1994) (Motion to dismiss claim of discriminatory employment practices under ï½§ 504 denied as defendant received federal assistance during the time of probationary employment and discharge.), aff'd without opinion, 56 F.3d 61 (4th Cir. 1995), cert. denied, 516 U.S. 916 (1995); see also Delmonte v. Department of Bus. Profl Regulation, Div. Of Alcohol, Beverages and Tobacco of Fla., 877 F. Supp. 1563 (S.D. Fla. 1995).[12]

1. Examples of Federal Financial Assistance

Agency regulations use similar, if not identical, language to define federal financial assistance:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provisions of the services of Federal personnel

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration

(5) Any other contract agreement or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty

65 Fed. Reg. 52866 (2000).[13] No extended discussion is necessary to show that money, through federal grants, cooperative agreements and loans, is federal financial assistance within the meaning of Title IX. See Paralyzed Veterans, 477 U.S. at 607 n.11. For example:

- United States military veterans are enrolled at Holy University, a private, religious university. The veterans receive payments from the federal government for educational pursuits and such monies are used by the veterans to pay a portion of their respective tuition payments at Holy University. Although federal payments are direct to the veterans and indirect to Holy University, the university is receiving federal financial assistance.

As set forth in the Title IX common rule, federal financial assistance may be in the form of a grant of land or use (rental) of federal property for the recipient at no or reduced cost. Since the recipient pays nothing or a lower amount for ownership of land or rental of property, the recipient is being assisted financially by the federal agency. Typically, assurances state that this type of assistance is considered to be ongoing for as long as the land or property is being used for the original or a similar purpose for which such assistance was intended. E.g., 65 Fed. Reg. 52867 at ï½§___.115. Moreover, regulations also generally bind the successors and transferees of this property, as long as the original purpose, or a similar objective, is pursued. 65 Fed. Reg. 52867 at ï½§ .115. Thus, if the recipient uses the land or rents property for the same purpose at the time of the alleged discriminatory act, the recipient is receiving federal financial assistance, irrespective of when the land was granted or donated.

For example:

- Sixteen years ago, the Department of Defense (DOD) donated land from a closed military base to a State social services agency as the location for a training facility for caseworkers. The training facility has been built and is in use by the State. Students at the training facility allege sexual harassment against certain training facilitators. Because the State still uses the land donated to it by the DOD for its original (or similar purpose), the State is still receiving federal financial assistance from DOD and DOD has jurisdiction to investigate the complaint under Title IX. See 32 C.F.R. ï½§ 195.6.

- A police department has a training facility located in a housing project built, subsidized, and operated with Housing and Urban Development (HUD) funds. The police department is not charged rent. Thus, the police department is receiving federal financial assistance and is subject to Title IX.

Under the Intergovernmental Personnel Act of 1970, federal agencies may allow a temporary assignment of personnel to State, local, and Indian tribal governments, institutions of higher education, federally funded research and development centers, and certain other organizations for work of mutual concern and benefit. See 5 U.S.C. ï½§ 3372. This detail of federal personnel to a State or other entity is considered federal financial assistance, even if the entity reimburses the federal agency for some of the detailed employee's federal salary. See Paralyzed Veterans, 477 U.S. at 612 n.14. However, if the State or other entity fully reimburses the federal agency for the employee's salary, it is unlikely that the entity receives federal financial assistance. For example:

- Two research scientists from the National Institute of Health (NIH) are detailed to a university research organization for two years to help research treatments for cancer. NIH pays for three-fourths of the salary of the two detailed employees, while the organization pays the remaining portion. The research organization is considered to be receiving federal financial assistance since the federal government is paying a substantial portion of the salary of the detailed federal employees. The research organization is thus now subject to Title IX.

Another common form of federal financial assistance provided by many agencies is training by federal personnel. For example:

- A city police department sends several police officers to training at the FBI Academy at Quantico without cost to the city. The entire police department is considered to have received federal financial assistance. See Delmonte v. Department of Bus. & Profl Regulation, Div. of Alcohol, Beverages, and Tobacco of Fla., 877 F. Supp. 1563 (S.D. Fla. 1995).

2. Direct and Indirect Receipt of Federal Assistance

Federal financial assistance may be received directly or indirectly.[14] For example, colleges indirectly receive federal financial assistance when they accept students who pay, in part, with federal financial aid directly distributed to the students. Grove City College v. Bell, 465 U.S. 555, 564 (1984)[15]; see also Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 603 (D. S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975). In Bob Jones Univ., 396 F. Supp. at 603, cited with approval in Grove City, 465 U.S. at 564, the university was deemed to have received federal financial assistance for participating in a program wherein veterans received monies directly from the Veterans Administration to support approved educational pursuits, although the veterans were not required to use the specific federal monies to pay the schools for tuition and expenses. Bob Jones Univ., 396 F. Supp. at 602-03 & n.22. Even if the financial aid to the veterans did not reach the university, the court considered this financial assistance to the school since this released the school's funds for other purposes. Id. at 602. Thus, an entity may be deemed to have "received Federal financial assistance" even if the entity did not show a "financial gain, in the sense of a net increment in its assets." Id. at 602-03. Aid such as this, and noncapital grants, are equally federal financial assistance. Id.

3. Federal Action That Is Not Federal Financial Assistance

To simply assert that an entity receives something of value in nonmonetary form from the federal government's presence or operations, however, does not mean that such benefit is federal financial assistance. For example, licenses impart a benefit since they entitle the licensee to engage in a particular activity, and they can be quite valuable. Licenses, however, are not federal financial assistance. Community Television of S. Cal. v. Gottfried, 459 U.S. 498, 509 (1983) (The Federal Communications Commission is not a funding agency and television broadcasting licenses do not constitute federal financial assistance); California Assn of the Physically Handicapped v. FCC, 840 F.2d 88, 92-93 (D.C. Cir. 1988) (same); see Herman v. United Bhd. of Carpenters & Joinders, 60 F.3d 1375, 1381-82 (9th Cir. 1995) (Certification of union by the National Labor Relations Board is akin to a license, and not federal financial assistance under ï½§ 504).

Similarly, statutory programs or regulations that directly or indirectly support, or establish guidelines for, an entity's operations are not federal financial assistance. Herman, 60 F.3d at 1382 (Neither Labor regulations establishing apprenticeship programs nor Davis-Bacon Act wage protections are federal financial assistance.); Steptoe v. Savings of America, 800 F. Supp. 1542, 1548 (N.D. Ohio 1992) (Mortgage lender subject to federal banking laws does not receive federal financial assistance.); Rannels v. Hargrove, 731 F. Supp. 1214, 1222-23 (E.D. Pa. 1990) (federal bank regulations are not federal financial assistance under the Age Discrimination Act).

Furthermore, programs "owned and operated" by the federal government, such as the air traffic control system, do not constitute federal financial assistance. Paralyzed Veterans, 477 U.S. at 612; Jacobson v. Delta Airlines, 742 F.2d 1202, 1213 (9th Cir. 1984) (air traffic control and national weather service programs do not constitute federal financial assistance).[16]110 Cong. Rec. 13380 (1964).

It also should be noted that while contracts of guaranty and insurance may constitute federal financial assistance, Title IX specifically states that it does not apply to contracts of insurance or guaranty. See 20 U.S.C. ï½§ 1682; see Gallagher v. Croghan Colonial Bank, 89 F.3d 275, 277-78 (6th Cir. 1996) (Default insurance for bank's disbursement of federal student loans is a "contract of insurance," and excluded from Section 504 coverage by agency regulations). But see Moore v. Sun Bank, 923 F.2d 1423, 1427 (11th Cir. 1991) (loans guaranteed by the Small Business Administration constituted federal financial assistance since Section 504 does not exclude contracts of insurance or guarantee from coverage as does Title IX).

Procurement contracts also are not considered federal financial assistance. DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377 (10th Cir. 1990); Jacobson, 742 F.2d at 1209; Muller v. Hotsy Corp., 917 F. Supp. 1389, 1418 (N.D. Iowa 1996) (procurement contract by company with GSA to provide supplies is not federal financial assistance); Hamilton v. Illinois Cent. R.R. Co., 894 F. Supp. 1014, 1020 (S.D. Miss. 1995). A distinction must be made between procurement contracts at fair market value and subsidies; the former is not federal financial assistance although the latter is. Jacobson, 742 F.2d at 1209; Mass v. Martin Marietta Corp., 805 F. Supp. 1530, 1542 (D. Co. 1992) (federal payments for goods pursuant to a contract, even if greater than fair market value, do not constitute federal financial assistance). As described in Jacobson and followed in DeVargas, there need not be a detailed analysis of whether a contract is at fair market value, but instead a focus on whether the government intended to provide a subsidy to the contractor. DeVargas, 911 F.2d at 1382-83; Jacobson, 742 F.2d at 1210. In DeVargas, a Department of Energy contract, issued through a competitive bidding process after a determination that a private entity could provide the service in a less costly manner, evidenced no intention to provide a subsidy to the contractor. Id. at 1382-83. For example:

- Dept. of Transportation (DOT) contracts with TechStuff, a private company that provides training on the use of computers for a subway system. Under the contract, full price is paid by DOT for the training to be provided by TechStuff. Because this is a direct procurement contract by the federal government, the funds paid to TechStuff by DOT do not subject TechStuff to Title IX.

Finally, Title IX does not apply to direct, unconditional assistance to ultimate beneficiaries, the intended class of private citizens receiving federal aid. For example, social security payments and veterans pensions are not federal financial assistance. Soberal-Perez v. Heckler, 717 F.2d 36, 40 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984); Bob Jones Univ., 396 F. Supp. at 602 n.16.[17]

B. Recipient

1. Regulations

A "recipient" is an entity that receives federal financial assistance and that operates "an education program or activity," and is thus subject to Title IX. The Title IX common rule provides as follows:

The term *recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.

65 Fed. Reg. 52866 at ï½§ ___.105 (2000).

Several aspects of the plain language of the regulations should be noted. First, a recipient may be a public (e.g., a State, local or municipal agency) or a private entity. Second, Title IX does not apply to the federal government. Therefore, a federal agency cannot be considered a "recipient" within the meaning of Title IX. Third, there may be more than one recipient in a program of federal financial assistance; that is, a primary recipient (e.g., State agency) that transfers or distributes assistance to a subrecipient (local entity) for distribution to an ultimate beneficiary.[18] Fourth, a recipient also encompasses a successor, transferee, or assignee of the federal assistance (property or otherwise), under certain circumstances. Fifth, as discussed in detail below, there is a distinction between a recipient and a beneficiary. Finally, although not addressed in the regulations, a recipient may receive federal assistance either directly from the federal government or indirectly through a third party, who is not necessarily another recipient. For example, schools are indirect recipients when they accept payments from students who directly receive federal financial aid.

2. Direct Relationship

The clearest means of identifying a "recipient" of federal financial assistance covered by Title IX is to determine whether the entity has voluntarily entered into a direct relationship with the federal government and receives federal assistance under a condition or assurance of compliance with Title IX. See Paralyzed Veterans, 477 U.S. at 605-606.

By limiting coverage to recipients, Congress imposes the obligations of ï½§ 504 [and Title IX] upon those who are in a position to accept or reject those obligations as part of the decision whether or not to "receive" federal funds.

Id. at 606; see also Soberal-Perez, 717 F.2d at 40-41. It is important to note that, by signing an assurance, the recipient is committing itself to complying with nondiscrimination mandates.[19] Even without a written assurance, courts describe obligations under nondiscrimination laws as similar to a contract, and have thus concluded that "the recipients' acceptance of the funds triggers coverage under the nondiscrimination provision." Paralyzed Veterans, 477 U.S. at 605. In this scenario, the recipient has a direct relationship with the funding agency and, therefore, is subject to the requirements of Title IX. For example:

- Six years ago, LegalSkool, a law school at a university, was built partly with federal grants, loans, and interest subsidies in excess of $7 million from the Department of Education (ED). The law school is a "recipient" because of the funding from ED for construction purposes.
- The U.S. Department of Justice (DOJ) provides funding for vocational education for

- inmates at a state prison. The prison is a recipient of federal financial assistance from DOJ.
- Hall City Police Department (HCPD) received a grant from DOJ for community outreach programs. HCPD is considered to be a recipient of federal financial assistance from DOJ.

While showing that the entity directly receives a federal grant, loan, or contract (other than a contract of insurance or guaranty) is the easiest means of identifying a Title IX recipient, this direct cash flow does not describe the full reach of Title IX.[20]

3. Indirect Recipient

A recipient may receive funds either directly or indirectly. Grove City College, 465 U.S. at 564-65.[21] For example, educational institutions receive federal financial assistance indirectly when they accept students who pay, in part, with federal loans. Although the money is paid directly to the students, the universities and other educational institutions are the indirect recipients. Id.; Bob Jones Univ., 396 F. Supp. at 602.

In Grove City College, the Supreme Court found that there was no basis to create a distinction not made by Congress regarding funding paid directly to or received indirectly by a recipient. 465 U.S. at 564-65. In reaching its conclusion, the Court considered the congressional intent and legislative history of the statute in question to identify the intended recipient. The Court found that the 1972 Education Amendments, of which Title IX is a part, are "replete with statements evincing Congress' awareness that the student assistance programs established by the Amendments would significantly aid colleges and universities. In fact, one of the stated purposes of the student aid provisions was to provid[e] assistance to institutions of higher educations. Pub. L. 92-318, ï½§ 1001(c)(1), 86 Stat. 831, 20 U.S.C. ï½§ 1070(a)(5)" Grove City College, 465 U.S. at 565-66. Finally, the Court distinguished student aid programs that are "designed to assist" educational institutions and that allow such institutions the option of participation in such programs, from other general welfare programs where individuals are free to spend the payments without limitation. Id. at 565 n.13.

In contrast, as subsequently explained by the Supreme Court in Paralyzed Veterans, it is essential to distinguish aid that flows indirectly to a recipient from aid to a recipient that reaches a beneficiary.

While Grove City stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid.

477 U.S. at 607.

Along these lines, the Supreme Court in NCAA v. Smith, 525 U.S. 459, 470 (1999), citing both Grove City and Paralyzed Veterans, stated that while dues paid to an entity (NCAA) by colleges and universities, who were recipients of federal financial assistance, "at most ... demonstrates that it [NCAA] indirectly benefits from the federal assistance afforded its afforded members." But the Court stated, "This showing, without more, is insufficient to trigger Title IX coverage. Smith, 525 U.S. at 468.[22]

4. Transferees and Assignees

Agency regulations and assurances often include specific statements on the application of Title IX to successors, transferees, assignees, and contractors.

In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient, or in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity....The designated agency official will specify the extent to which such assurances will be required of the applicants or recipients subgrantees, contractors, subcontractors, transferees, or successors in interest.

65 Fed. Reg. 52867 at ï½§___.115 (2000) (emphasis added).

Furthermore, Title IX regulations provide that land originally acquired through a program receiving federal financial assistance must include a covenant binding on subsequent purchasers or transferees that requires nondiscrimination for as long as the land is used for the original or a similar purpose for which the federal assistance is extended. 65 Fed. Reg. 52867 at ï½§ .115 (2000).[23]

5. Primary/Subrecipient Programs

Many programs have two recipients. The primary recipient directly receives the federal financial assistance. The primary recipient then distributes the federal assistance to a subrecipient to carry out a program. Both the primary recipient and subrecipient must conform their actions to Title IX (and other nondiscrimination laws). For example:

- A State agency, such as the Department of Children and Family Services, receives a substantial portion of its funding from the federal government. The State agency, as the primary recipient or conduit, in turn, funds local social service organizations, in part, with its federal funds. The local agencies receive federal financial assistance, and thus are subject to Section 504 (and other nondiscrimination laws). See Graves v. Methodist Youth Servs., Inc., 624 F. Supp. 429 (N.D. Ill. 1985).[24] Education programs conducted by the State Department of Children and Family Services and by the local social service organizations are all covered by Title IX.
- Under the Older Americans Act, funds are given by the Department of Health and Human Services to State agencies which, in turn, distribute funds according to funding formulas to local agencies operating programs for elderly Americans. Title VI applies to the programs and activities of the State agencies because of each agencys status as a direct conduit recipient passing federal funds on to subrecipients. Title VI also applies to the local agencies as subrecipients of federal financial assistance. See Chicago v. Lindley, 66 F.3d 819 (7th Cir. 1995). Title IX would similarly apply to any education programs conducted by the State or local entities.

6. Contractor and Agent

A recipient may not absolve itself of its Title IX and other nondiscrimination obligations by hiring a contractor or agent to perform or deliver assistance to beneficiaries. Agency regulations consistently state that prohibitions against discriminatory conduct, whether intentional or through sex neutral means with an unjustified disparate impact, apply to a recipient, whether committed "directly or through contractual or other arrangements." E.g., 28 C.F.R. ï½§ï½§ 42.104(b)(1), (2) (emphasis added). For example:

- A recipient department of corrections contracts with a tutoring company to provide vocational training to inmates. Employees of the contractor refuse to admit female prisoners to a welding training class the contractor is conducting. The recipient is liable under Title IX for the contractor's actions as the contractor is performing a program function of the recipient.

One also should evaluate the agency's assurances or certifications; such documents can provide an independent basis to seek enforcement. For example, the assurance for the Office of Justice Programs, within the Department of Justice, states, inter alia,

It [the Applicant] will comply, and all its contractors will comply, with the nondiscrimination requirements of the [Safe Streets Act, Title VI, Section 504, Title IX . . . .] (emphasis added).

7. Recipient v. Beneficiary

Finally, in analyzing whether an entity is a recipient, it is necessary to distinguish a recipient from a beneficiary. According to the Supreme Court, the Title IX regulations issued by the Department of Education "make[s] clear that Title IX coverage is not triggered when an entity merely benefits from federal funding." NCAA v. Smith, 525 U.S. 459, 468 (1999), citing 34 C.F.R. ï½§ 106.2(h). In NCAA v. Smith, a student athlete sued the NCAA, claiming that the NCAAs refusal to grant a waiver of its bylaw prohibiting a student from participating in athletics programs in other than the students undergraduate institution violated Title IX. Smith claimed that the NCAAs receipt of dues from its member schools, which received federal financial assistance, subjected the NCAA to Title IX coverage.

The Court, however, rejected this claim and held that "[a]t most, the [NCAAs] receipt of dues demonstrates that it indirectly benefits from the federal financial assistance afforded its members. This showing without more is insufficient to trigger Title IX coverage." Id. at 468. The Court noted that the definition of a recipient under Title IX regulations follows the "teaching of Grove City and Paralyzed Veterans: Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not." NCAA v. Smith, 525 U.S. at 468.

An assistance program may have many beneficiaries, that is, individuals and/or entities that directly or indirectly receive an advantage through the operation of a federal program. Beneficiaries, however, do not enter into any formal contract or agreement or sign an assurance with the federal government where compliance with Title VI (or Title IX) is a condition of receiving the assistance. Paralyzed Veterans, 477 U.S. at 606-607.

In almost any major federal program, Congress may intend to benefit a large class of persons, yet it may do so by funding - that is, extending federal financial assistance to - a limited class of recipients. Section 504, like Title IX in Grove City, 465 U.S. 555 (1984), draws the line of federal regulatory coverage between the recipient and the beneficiary.

Id. at 609-10. Title IX was meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary, or disburses federal assistance to another recipient for ultimate distribution to a beneficiary.[25] It is important to note that the Supreme Court has firmly established that the receipt of student loans or grants by an entity renders the entity a recipient of federal financial assistance. See Grove City 465 U.S. at 569.

In Paralyzed Veterans, a Section 504 case decided under Department of Transportation regulations, the Court held that commercial airlines that used airports and gained an advantage from the capital improvements and construction at airports were beneficiaries, and not recipients, under the airport improvement program. The airport operators, in contrast, directly receive the federal financial assistance for the airport construction. The Court examined the program statutes and concluded:

Congress recognized a need to improve airports in order to benefit a wide variety of persons and entities, all of them classified together as beneficiaries. [note omitted]. Congress did not set up a system where passengers were the primary or direct beneficiaries, and all others benefitted by the Acts are indirect recipients of the financial assistance to airports....The statute covers only those who receive the aid, but does not extend as far as those who benefit from it....Congress tied the regulatory authority to those programs or activities that receive federal financial assistance.

Id. at 607-09.

C. Covered Education Program or Activity

1. Introduction

Title IX prohibits recipients of federal financial assistance from discriminating on the basis of sex in education programs or activities. In the context of traditional educational institutions,[26] it is well established that the covered education program or activity encompasses *all* of the educational institutions operations including, but not limited to, "traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities." S. Rep. No. 64 at 17, reprinted in 1988 U.S.C.C.A.N. at 19. As noted in the Introduction, however, the primary focus of this Title IX Manual is on education programs or activities conducted outside traditional educational institutions. This section, therefore, discusses the scope of Title IXs ban on sex discrimination in this context, i.e., what constitutes a covered "education program or activity" for recipients of federal financial assistance other than traditional educational institutions, such as hospitals or prisons.[27]

In analyzing the scope of coverage under Title IX, it is critical to understand the role of the CRRA. As discussed in Chapter I, the CRRA amended Title IX, Title VI, Section 504, and the Age Discrimination Act by adding an explicit and expansive definition of "program or activity" that encompasses "all of the operations of" a covered entity, any part of which receives federal financial assistance, in order to establish the principle of institution-wide coverage. However, Title IX, unlike the other statutes amended by the CRRA, prohibits discrimination only in "education" programs or activities. Thus, it is necessary to reconcile the institution-wide coverage mandated by the CRRA with the fact that Title IXs ban on sex discrimination is limited to education programs or activities.

As explained below, outside the context of traditional educational institutions, a fact-specific inquiry is required to determine which portions of a covered program or activity are educational, and thus covered by Title IX. In light of the broad sweep envisioned for Title IX, and the expansive notion of institution-wide coverage mandated by the CRRA, such inquiries must be made as broadly as possible.

2. The Civil Rights Restoration Act of 1987

Before examining the question of what constitutes a covered education program or activity under Title IX, as amended by the CRRA, it is helpful to take a closer look at the CRRA and the expansive definition of "program" and "program or activity" enacted by this amendment.

Congress intent in passing the CRRA was clear: to establish the principle of broad, institution-wide coverage under the four major civil rights statutes that prohibit discrimination in federally assisted programs. S. Rep. No. 64 at 2, reprinted in 1988 U.S.C.C.A.N. at 4-5. The CRRA includes virtually identical amendments to Title IX, Title VI, Section 504, and the Age Discrimination Act, to broadly define "program" or "program or activity" as "all of the operations of":

For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such state or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local education agency (as defined in ï½§ 8801 of this title), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, private organization, or an entire sole proprietorship --

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance...

20 U.S.C. ï½§ 1687. Since passage of the CRRA, courts have consistently held that the receipt of federal funds results in entity-wide coverage under these statutes. See, e.g., Knight v. Alabama, 787 F. Supp. 1030, 1064 (N.D. Ala. 1991), affd in part, revd in part, and vacated in part, 14 F.3d 1534 (11th Cir. 1994). See also United States Department of Justice, Title VI Legal Manual, Chapter VII (1998).

3. Meaning of "education program or activity"

It is clear that the CRRA was designed to establish broad institution-wide coverage for Title IX, Title VI, Section 504, and the Age Discrimination Act. However, by defining only "program or activity," the CRRA did not directly address the question of how to interpret the modifier "education" for purposes of Title IX coverage. As a result, coverage under Title IX involves an issue of statutory interpretation that does not arise for the other three civil rights statutes, namely: to what extent does "education" provide a limitation on the concept of institution-wide coverage embodied in the CRRA?

The legislative history of the CRRA reveals that some members of Congress struggled with this very issue. Some legislators apparently believed and/or feared that enactment of the CRRA would effectively "read-out" the education limitation in Title IX by prohibiting sex discrimination in all of the operations of a recipients program or activity, provided the program or activity contained at least one educational component. Other members of Congress, however, apparently believed that the receipt of federal funds would subject a recipients entire program or activity to coverage under all four civil rights statutes, but Title IXs prohibition on sex-based discrimination would remain limited to the educational components of a recipients program, if any.

Most significantly, the 1988 Senate Report for the CRRA addresses this limitation. Although the Report contains numerous hypotheticals to explain the new definition of "program or activity" (most of which do not single out Title IX, referring collectively to the four civil rights statutes instead), one example does note that Title IXs coverage will be limited to education:

If a private hospital corporation is extended federal assistance for its emergency rooms, all the operations of the hospital, including for example, the operating rooms, the pediatrics department, admissions, discharge offices, etc., are covered by Title VI, Section 504, and the Age Discrimination Act. Since Title IX is limited to education programs or activities, it would apply only to the students and employees of education programs operated by the hospital, if any.

S. Rep. No. 100-64, at 17.[28]

4. Covered "education programs or activities"

Of course, ordinary rules of statutory construction require that meaning be given to all phrases of a statute. See Connecticut Dept of Income Maintenance v. Heckler, 471 U.S. 524, 530 n.15 (1985). As the Supreme Court has repeatedly emphasized, "It is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute." Id.

Thus, in determining the proper scope of coverage for Title IX, as amended by the CRRA, it is important to give meaning to both the modifier "education" and the phrase "program or activity." This requires that the fact that Title IXs ban on sex discrimination is limited to "education" be balanced against the concept of broad, institution-wide coverage contemplated by the CRRAs definition of "program or activity."

In light of these considerations, a fact-specific inquiry is necessary to determine what constitutes a covered "education program or activity." In other words, Title IXs scope of coverage will depend upon which portions of a covered program or activity are educational in nature.

In conducting such factual inquiries, it is important to remember that determinations as to what constitutes a covered education program must be made as broadly as possible. This principle is consistent with both the broad sweep of coverage originally envisioned for Title IX as well as the expansive notion of institution-wide coverage mandated by the CRRA.

Notably, the Ninth Circuit has concluded that it is appropriate to conduct just such a fact-specific inquiry in order to determine the proper scope of coverage under Title IX. In Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994), the court determined that whether various components of a correctional facility, such as the prison industries, the farm annex, or the forest work camp, constituted an "educational" program within the meaning of Title IX was a question of fact. Jeldness, 30 F.3d at 1226.

As the Jeldness opinion illustrates, the question of what constitutes a covered education program for purposes of Title IX requires a factual determination as to whether the relevant portion of a recipients program is educational in nature. While Title IXs antidiscrimination protections, unlike Title VIs, are limited in coverage to "education" programs or activities, the determination as to what constitutes an "education program" must be made as broadly as possible in order to effectuate the purposes of both Title IX and the CRRA. Both of these statutes were designed to eradicate sex-based discrimination in education programs operated by recipients of federal financial assistance, and all determinations as to the scope of coverage under these statutes must be made in a manner consistent with this important congressional mandate.

IV. Discriminatory Conduct

A. General

Title IX was modeled after Title VI of the Civil Rights Act of 1964 and they both share a common purpose: to ensure that public funds derived from all the people are not utilized in ways that encourage, subsidize, permit, or result in prohibited discrimination against some of the people.[29] Towards that end, both Title VI and Title IX broadly prohibit conduct by a recipient of federal financial assistance that results in a person being "excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under" a federally-assisted program or activity.[30]

Title VI was enacted pursuant to Congress dual authority under the Spending Clause[31] and Section 5 of the Fourteenth Amendment.[32] Thus, both Title VI and Title IX trace their roots to common constitutional sources.

Title IX, like Title VI, recognizes three general types of prohibited discrimination: (1) disparate treatment, (2) disparate impact, and (3) retaliation. Any effective and meaningful administrative enforcement program under Title IX must be prepared to address all three.

1. Disparate Treatment

Disparate treatment[33] refers to actions that treat similarly situated persons differently on the basis of a prohibited classification. In the case of Title IX, the prohibited classification is sex. Under the disparate treatment theory of discrimination, the core question is whether a recipient, through its officials, has treated people differently on the basis of sex. Here, the applicable legal standards under Title VI and Title IX are generally identical and investigative officials can rely on case law decided under Title VI in establishing violations under Title IX.[34]

To establish disparate treatment, the fundamental task is to show that similarly situated individuals were treated differently because of, or on the basis of their sex. This requires that the decision maker was aware of the complainants sex and took action at least in part based on that sex. This does not mean, however, that the evidence must show "bad faith, ill will or any evil motive on the part of the [recipient]."[35] Disparate treatment prohibits unjustified sex-based distinctions regardless of the motivation behind those distinctions. For example, many statutory or administrative schemes that illegally discriminate on the basis of sex were created or were subsequently justified as efforts to address the special needs of a particular sex.[36] It is not a harmful motive, but the decision to treat differently on the basis of sex, that runs afoul of Title IX.

Evidence of discriminatory intent may be direct or circumstantial and may be found from various sources, including statements by decision makers, the historical background of the events in issue, the sequence of events leading to the decision in issue, a departure from standard procedure (e.g., failure to consider factors normally considered), legislative or administrative history (e.g., minutes of meetings), a past history of discriminatory or segregated conduct, and statistical evidence.[37]

Direct proof of discriminatory intent is often unavailable. In the absence of such evidence, claims of intentional discrimination under Title IX may be analyzed using the Title VII burden-shifting framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).[38]

Applying the McDonnell Douglas principles to a Title IX claim, the investigating agency must first determine whether the case file raises an inference of discrimination, *i.e.*, the investigating agency must establish a prima facie case. The elements of a prima facie case may vary depending on the facts of the complaint, but such elements often include the following:

1. that the aggrieved person was a member of a protected class;

2. that this person applied for, and was eligible for, an educational program operated by a recipient of federal financial assistance that was accepting applicants;

3. that despite the persons eligibility, he or she was rejected; and,

4. that the recipient selected applicants of the complainants qualifications of the other sex or that the program remained open and the recipient continued to accept applications from other applicants.[39]

If the case file contains sufficient evidence to establish a prima facie case of discrimination, the investigating agency must then determine whether the recipient can articulate a legitimate, nondiscriminatory reason for the challenged action.[40] If the recipient can articulate a nondiscriminatory explanation for the alleged discriminatory action, the investigating agency must determine whether the case file contains sufficient evidence to establish that the recipients stated reason was a pretext for discrimination. In other words, the evidence must support a finding that the reason articulated by the recipient was not the true reason for the challenged action, and that the real reason was discrimination based on sex.[41]

Similar principles may be used to analyze claims that a recipient has engaged in a "pattern or practice" of unlawful discrimination. Such claims may be proven by a showing of "more than the mere occurrence of isolated or accidental or sporadic discriminatory acts."[42] The evidence must establish that a pattern of discrimination based on sex was the recipients "standard operating procedure - the regular rather than the unusual practice."[43] Once the existence of such a discriminatory pattern has been proven, it may be presumed that every disadvantaged member of the protected class was a victim of the discriminatory policy, unless the recipient can show that its action was not based on its discriminatory policy.[44]

It is also important to remember that some claims of intentional discrimination may involve the use of policies or practices that explicitly classify individuals on the basis of sex. Such "classifications" may constitute unlawful discrimination. For example, the Supreme Court held in a Title VII case that a policy that required female employees to make larger contributions to a pension fund than male employees created an unlawful classification based on sex.[45] The investigation of such claims should focus on the recipients reasons for utilizing the challenged classification policies. Most such policies will be deemed to violate Title IX (assuming the actions occurred in an education or training program) unless the recipient can articulate a lawful justification for classifying people on the basis of sex.

2. Disparate Impact

In contrast to disparate treatment, which focuses on the intent to cause sex-based results, disparate impact focuses on the consequences of a facially sex-neutral policy or practice. Under this theory of discrimination, the core inquiry focuses on the results of the action taken, rather than the underlying intent.[46] Because of this difference in focus, evidence of a discriminatory intent or purpose is not required. Indeed, "intent" is not an element in the disparate impact analysis.

Following the Title VI model, Congress delegated to each funding agency the authority to implement Title IXs prohibition of sex discrimination in educational programs or activities of recipients of federal financial assistance by issuing regulations, and those regulations have the force and effect of law.[47] In furtherance of this broad delegation of authority, federal agencies have uniformly implemented Title IX in a manner that incorporates and applies the disparate impact theory of discrimination.

The courts have sustained the use of disparate impact theory as lawful and proper exercises of agencies delegated authority, even where the challenged actions or practices do not constitute intentional discrimination and thus are not prohibited directly by the explicit language of either Title VI or Title IX.[48]

Under the disparate impact theory, a recipient violates agency regulations by using a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification. As in Title VI disparate impact cases, the elements of a Title IX disparate impact claim derive from the analysis of cases decided under Title VII disparate impact law. [49]

In a disparate impact case, the focus of the investigation concerns the consequences of the recipient's practices, rather than the recipient's intent.[50] To establish discrimination under a disparate impact scheme, the investigating agency must first ascertain whether the recipient utilized a facially neutral practice that had a disproportionate impact on the basis of sex.[51] In doing so, the investigating agency must do more than demonstrate that the practice or policy in question is a "bad idea."[52] The agency must show a causal connection between the facially neutral policy and the disproportionate and adverse impact on a protected group.[53]

If the evidence establishes a prima facie case, the investigating agency must then determine whether the recipient can articulate a "substantial legitimate justification" for the challenged practice.[54] "Substantial legitimate justification" is similar to the Title VII concept of "business necessity," which involves showing that the policy or practice in question is related to performance on the job.[55]

To prove a "substantial legitimate justification," the recipient must show that the challenged policy was "necessary to meeting a goal that was legitimate, important, and integral to the [recipients] institutional mission."[56] The justification must bear a "manifest demonstrable relationship" to the challenged policy.[57] In an education context, the practice must be demonstrably necessary to meeting an important educational goal, i.e. there must be an "educational necessity" for the practice.

If the recipient can make such a showing, the inquiry then turns to whether there are any "equally effective alternative practices" that would result in less adverse impact.[58] Evidence of either will support a finding of liability.

Courts have often found Title VI disparate impact violations in cases where recipients utilize policies or practices that result in the provision of fewer services or benefits, or inferior services or benefits, to members of a protected group. A similar outcome should result under Title IX where sex is the basis for the differences in impact. For example, in Sharif v. New York State Educ. Dept, 709 F. Supp. 345 (S.D.N.Y. 1989), the District Court applied a discriminatory effects test to analyze the Title IX claims of a class of female applicants for New York State Merit Scholarships who alleged that the states sole reliance on SAT scores to determine eligibility for such scholarships disproportionately discriminated against women. The District Court, in granting the plaintiffs motion for a preliminary injunction, found that the states system of awarding Merit Scholarships had a discriminatory impact on women and constituted a violation of Title IX.[59] See also Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984), in which the Ninth Circuit applied a discriminatory effects test to analyze the Title VI claims of a class of black school children who were placed in special classes for the "educable mentally retarded" ("EMR") on the basis of non-validated IQ tests. The Ninth Circuit upheld the district courts finding that use of these IQ tests for placement in EMR classes constituted a violation of Title VI.[60] Similarly, in Sandoval, the court held that discrimination on the basis of language, in the form of an English-only policy, had an unjustified disparate impact on the basis of national origin, and thus violated Title VI.[61]

In evaluating a potential disparate impact violation, it is important to examine whether there is a substantial legitimate justification for the challenged practice and whether there exists an alternative practice that is comparably effective with less of a disparate impact.[62]

For example, the Second Circuit in New York Urban League, reversed the district courts preliminary injunction for its failure to consider whether there was a "substantial legitimate justification" for a subway fare increase that had an adverse impact.[63]

[B]ut the district court did not consider, much less analyze, whether the defendants had shown a substantial legitimate justification for this allocation. The MTA and the State identified several factors favoring a higher subsidization of the commuter lines. By encouraging suburban residents not to drive into the City, subsidization of the commuter rails minimizes congestion and pollution levels associated with greater use of automobiles in the city; encourages business to locate in the City; and provides additional fare-paying passengers to the City subway and bus system. In these respects and in others, subsidizing the commuter rails may bring material benefits to the minority riders of the subway and bus system. The district court dismissed such factors, concluding that the MTA board did not explicitly consider them before voting on the NYCTA and commuter line fare increases. That finding is largely irrelevant to whether such considerations would justify the relative allocation of total funds to the NYCTA and the commuter lines (emphasis added).

Similarly, in Young by and through Young v. Montgomery County (Ala) Bd. of Educ.,[64] the court ruled that even if a disparate impact were assumed, the defendants had established a "substantial legitimate justification."

[T]he Defendants presented evidence that Policy IDFA was adopted to address concerns that the M to M transfer program was being used to facilitate athletic recruiting in the Montgomery County school system and to help revitalize Montgomerys west side [minority] high schools. Both of these justifications are substantial and legitimate because they evince a genuine attempt by the Board of Education to improve the quality of education offered in [the] County.[65]

If a substantial legitimate justification is identified, the third stage of the disparate impact analysis is the challenging partys identification of a less discriminatory alternative.[66] If there is an alternative policy or procedure that has less of an adverse impact but achieves the goals that were determined to be legitimate, the recipient should use that policy or procedure.

3. Retaliation

A right cannot exist in the absence of some credible and effective mechanism for its enforcement and enforcement cannot occur in the absence of a beneficiary class willing and able to assert the right. In order to ensure that beneficiaries are willing and able to participate in the enforcement of their own rights, a recipients retaliation against a person who has filed a complaint or who assists enforcement agencies in discharging their investigative duties violates Title IX.[67]

The Title IX regulations incorporate the requirement in the Title VI regulations, which provides that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title VI], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subpart."[68]

Retaliation protections are designed to preserve the integrity and effectiveness of the enforcement process itself. Because of this purpose, the merits of any underlying complaint of sex discrimination are irrelevant in assessing a retaliation complaint.[69] The prohibited conduct is the act of retaliation itself.

Moreover, protected activities include more than filing complaints seeking a vindication of personal rights.[70] The Department believes that a narrow reading requiring the prior exercise of personal rights is inconsistent with the broad remedial purposes behind Title IX itself.[71] It is important to re-emphasize that Title VI agency anti-retaliation regulations (incorporated into Title IX regulations) provide "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title VI], . . ." Thus, anyone who asserts rights secured by Title IX is protected. Retaliation claims have their own remedial purpose in that they seek to ensure that rights created under a federal civil rights statute do not go unenforced for fear of adverse official reaction.[72] This goal is undercut if recipients are allowed to retaliate against persons subject to their authority who publicly object to discrimination against others.

Four elements must be established to make out a prima facie case of retaliation:

1. The complainant engaged in activities or asserted rights protected under Title IX;

2. The recipient knew of the protected activity;

3. The recipient thereafter subjected the person to adverse action, treatment or conditions; and

4. There is a causal connection between the protected activity and the adverse action, treatment or conditions.[73]

Once a prima facie case of retaliation is established, the investigating agency must then determine whether the recipient can articulate a legitimate, nondiscriminatory reason for the adverse action. Id. If the recipient can offer such a reason, the investigating agency must then show that the recipients proffered reason is pretextual and that the recipients actual reason was retaliation. Id. A showing of pretext may be sufficient to support an inference of retaliation if the fact finder concludes that retaliation was the real purpose of the action. Id.

B. Employment Discrimination

Title IX has proven a helpful vehicle in addressing sex-based employment discrimination in educational programs and activities.

1. Scope of Coverage

Title IX and Title VI differ most in their scope of coverage. By way of summary, Title VI is broader as to the types of programs or activities covered (i.e., it covers all the operations of a recipients programs and activities) but narrow in its ability to reach employment discrimination. Specifically, Title VI prohibits employment discrimination on the part of a recipient only where a purpose of the federal financial assistance received is to provide employment. 42 U.S.C. ï½§2000d-3.[74] Title IX, on the other hand, is narrower as to the types of programs or activities covered (i.e., it only covers educational components) but broader in that it reaches employment discrimination. Because Title IX does not contain limiting language as does Title VI, the courts have concluded that Title IX reaches employment discrimination in the educational programs or activities of recipients without limitation.[75]

Consistent with this construction, most federal agencies have joined in adopting final regulations implementing Title IX which broadly prohibit "discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance."[76]

2. Relationship to Title VII

The enforcement schemes of Title IX and Title VII overlap in the area of employment discrimination.

a. Substantive Standards

In resolving employment actions, the courts have generally held that the substantive standards and policies developed under Title VII to define discriminatory employment conduct apply with equal force to employment actions brought under Title IX.

. . .[W]hen a plaintiff complains of discrimination with regard to conditions of employment in an institution of higher learning, the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case.[77]

The use of case law and policies developed under Title VII is similarly appropriate in the administrative setting. In conducting investigations alleging employment discrimination, agencies shall consider Title VII case law and EEOC Guidelines, 29 CFR parts 1604-1607, unless inapplicable, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice.[78]

b. Procedural Standards

While the courts, including the Supreme Court, have looked to the substantive standards and policies developed under Title VII as either controlling or helpful in evaluating claims of employment discrimination under Title IX,[79] the same cannot be said of Title VIIs procedural requirements.

The Supreme Court has yet to explicitly decide whether the far more detailed and comprehensive procedural requirements of Title VII are applicable to claims of employment discrimination brought under Title IX. The lower courts that have faced this question are divided. One view treats Title IX as an independent basis for finding discrimination based on the substantive standards of Title VII, but divorced from its administrative requirements.[80] Under this view, complainants filing complaints under Title IX are not subject to Title VIIs filing deadlines, exhaustion of administrative remedy requirements, and state referral requirements, but are still governed by Title VIIs substantive standards. The other view is that the more focused and detailed enforcement scheme of Title VII preempts Title IX in the area of employment discrimination.[81] Under this view, employees of federally assisted education programs operated by recipients of federal financial assistance have only a Title VII remedy for sex-based employment discrimination.

The Department takes the position that Title IX and Title VII are separate enforcement mechanisms. Individuals can use both statutes to attack the same violations. This view is consistent with the Supreme Courts decisions on Title IXs coverage of employment discrimination, as well as the different constitutional bases for Title IX and Title VII. Of course, this view is important only for individuals wishing to file private rights of action in courts. Federal agencies responsible for investigating Title IX complaints alleging employment discrimination must follow the procedures discussed in Section B(5) of this chapter. This section describes a regulation jointly issued by the Department of Justice and Equal Employment Opportunity Commission,[82] which sets out procedures for processing employment complaints covered by both Title VII and Title IX.

3. Prohibited Employment Practices

As noted above, the Title IX common rule specifically incorporates the disparate impact standard as part of its prohibitions against sex-based employment discrimination.[83] In addition, the Title IX common rule applies its prohibition against sex-based discrimination to the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention or treatment of employees.[84] The Title IX common rule addresses various areas including the treatment of pregnancy as a temporary disability, pre-employment inquiries regarding marital or parental status, imposition of employment criteria or testing devices having a disproportionate impact, recruitment, and compensation and benefits (including equal pension contributions and benefits).

Where the Title IX common rule does not address some aspect of the employment relationship or where more detailed guidance is required beyond that provided by the Title IX common rule (and if there is no relevant guidance issued by the Department of Education interpreting its Title IX regulations), agency officials should review and apply the applicable standards and policies developed under Title VII.

4. Special Considerations

Two areas raise special considerations requiring specific discussion. In some cases, recipients may attempt to modify their obligations under Title IX in an effort to comply with other legal or contractual obligations. In other cases, recipients may attempt to create sex-sensitive criteria for employment in specific types of positions.

a. Competing Legal Obligations

Recipients are sometimes subject to competing and/or contradictory requirements having the potential to interfere with their ability to fully discharge their Title IX obligations. These competing obligations might result from state or local laws or find their source in third party labor or service contracts. They could include, for example, limitations or restrictions on the number of hours worked or types of jobs filled by women. Given the Supremacy and Spending Clauses, however, a recipients federal obligation to comply with Title IX to eliminate unjustified sex-based discrimination in employment is superior to its obligation to comply with local law or third party contracts. In pertinent part, the Title IX common rule provides that:

(a) *Prohibitory requirements*. The obligation to comply with ï½§ï½§____.500 through ____.550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

Thus, in cases of conflict between the requirements of Title IX and obligations imposed by local law or third party contracts, Title IX controls. If an entity does not want to follow Title IX, it is free to simply decline federal financial assistance but it still may be subject to Title VII.

b. Sex as a BFOQ.

As noted above, Title IX generally incorporates the standards and policies developed under Title VII of the Civil Rights Act of 1964, as amended. Among those standards is the recognition that, in extremely limited circumstances, sex may constitute a bona fide occupational qualification ("BFOQ"). It bears emphasis that BFOQs are very narrow exceptions.[85]

The Title IX common rule acknowledges and incorporates the BFOQ exception at ï½§____.550.

A recipient may take action otherwise prohibited . . .provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students or other persons, but nothing contained in this section shall prevent a recipient from considering an employees sex in relation to employment in a locker room or toilet facility used only by members of one sex.

In evaluating claims that sex-based job qualifications are justified as a BFOQ, agency investigative officials should consult and apply the standards and case law developed under Title VII with respect to this narrow exception.

5. Regulatory Referral to EEOC

Complaints received by federal agencies that allege sex-based employment discrimination should be processed in conformity with the "Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance."[86] These Joint Complaint Procedures, promulgated jointly by the Department of Justice and the Equal Employment Opportunity Commission in 1983, are intended to "reduce duplicative efforts by different Federal agencies . . . reduce the burden on employers [and] allow . . . agencies to focus their resources on allegations of services discrimination."[87] As discussed below, these procedures require referral of employment complaints to the Equal Employment Opportunity Commission in some circumstances.

Under the Joint Complaint Procedures, complaints are deemed filed with the EEOC as of the date the complaint was received by the sister federal agency. Moreover, the Joint Complaint Procedures require that the recipient be advised of receipt of the employment complaint within 10 days.[88] Within 30 days of receipt, the receiving agency is to determine its jurisdiction over the complaint and the procedure under which it will be handled.[89]

In those cases where the agency does not have jurisdiction over the employment complaint (i.e., the alleged discriminating entity does not receive federal financial assistance or it receives federal financial assistance but does not have an educational component), the agency is to transfer the complaint to the EEOC and advise both the complainant and the recipient of the specific office of the EEOC to which the complaint is being transferred.

Where the complaint alleges employment discrimination over which both the agency and EEOC have parallel authority (i.e., a "joint" complaint), the Joint Complaint Procedures direct that, absent "special circumstances,"[90] individual complaints should be directed to the EEOC for processing with the referring agencys action deferred pending completion of the EEOC complaint process. In the case of a joint complaint alleging a pattern or practice of employment discrimination, however, the Joint Complaint Procedures reverse the referral presumption. In these cases, the Procedures contemplate that the agency will retain investigative and enforcement authority over the complaint absent "special circumstances" warranting a referral to the EEOC. Finally, where the complaint alleges discrimination in both the provision of educational services and employment, the Joint Complaint Procedures again direct that, absent special circumstances, the agency should retain its authority over the complaint rather than refer the matter to the EEOC.

The rationale behind the referral rules set out in the Joint Complaint Procedures is not difficult to discern. Given Title VIIs specific focus on employment discrimination and EEOCs nationwide system of complaint adjudication offices, it is logical to refer all individual complainants to the expert federal agency. However, complaints alleging a pattern or practice of employment discrimination or discrimination in the provision of educational services, implicate the core integrity of the educational program or activity of the recipient of federal financial assistance. In these cases, logic and the greater expertise of the funding agency regarding the core purposes of the federal financial assistance argue in favor of its retaining jurisdiction over these broader complaints.

C. Specific Provisions

1. Specific prohibitions (ï½§ ___.400(b))

Under the Title IX common rule, as a general matter, in providing any aid, benefit, or service, a recipient may not, on the basis of sex:

- Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- Deny any person any such aid, benefit, or service;
- Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition.
- Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

65 Fed. Reg. at 52870.

2. Housing (ï½§___.405)

Under the Title IX common rule, a recipient may not apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing. However, a recipient may provide separate housing on the basis of sex if such housing is both proportionate in quantity to the number of students of each sex applying for the housing and comparable in quality and cost to the student. A recipient which assists an agency, organization, or person in making housing available to any of its students such as through solicitation, listing, approval, or otherwise must take reasonable steps to assure itself that such housing, as a whole, also meets these requirements. However, a recipient may render such assistance to an agency, organization, or person that provides all or part of such housing to students of only one sex. 65 Fed. Reg. at 52871.

3. Comparable Facilities (ï½§ ___.410)

Under the Title IX common rule, recipients of federal financial assistance must not discriminate in providing facilities on the basis of sex. A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex. However, such facilities provided to one sex must be comparable to the facilities provided to the other sex. 65 Fed. Reg. at 52871.

4. Access to Course Offerings (ï½§ ___.415)

A recipient generally may not provide an education program or activity separately on the basis of sex or require or refuse participation by an individual of a certain sex in courses such as health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses on the basis of sex.[91] 65 Fed. Reg. 52871. However, in a prison setting, penal necessities may require educational programs and activities to be offered separately on the basis of sex. While separate courses may be offered in a prison setting, penal necessity is not a defense for failing to provide equality of access to comparable educational programs to male and female inmates.

5. Counseling and use of appraisal and counseling materials (ï½§ .425)

Under the Title IX common rule, a recipient may not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission. Specifically, in appraising or counseling students, a recipient must not use different testing or other materials on the basis of sex or use materials that permit or require different treatment of students on the basis of sex. Such different materials may be used, however, where they cover the same occupational interest areas and their use is shown to be essential to eliminate sex bias. Finally, where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient must take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors. 65 Fed. Reg. at 52871.

6. **Financial Assistance** (ï½§ ___ .430)

When a recipient provides financial assistance to any student participating in an educational program or activity, the recipient must ensure that it does not provide different types or amounts of assistance, limit eligibility for such assistance, apply different criteria, or otherwise discriminate in the provision of financial assistance on the basis of sex. See 65 Fed. Reg. 52871 at ï½§ .430(a)(1). Similarly, the recipient must not assist, solicit, list, approve, provide facilities to, or assist in any other manner, a "foundation, trust, agency, organization, or person that provides such assistance to any of the recipients students" in a sexually discriminatory manner. 65 Fed. Reg. 52871 at ï½§____.430(a)(2).

Although recipients are allowed to administer or assist in administering specific sex-restricted scholarships, fellowships, or other forms of financial assistance to students through a domestic or foreign will, trust, bequest, or similar instrument, the Title IX regulations require that the overall effect of such sex-restricted financial assistance not discriminate on the basis of sex. 65 Fed. Reg. 52872 at ï½§____.430(b). To ensure compliance with Title IX regulations, recipients must develop and use procedures that select students to be awarded financial assistance in a nondiscriminatory manner and not on the basis of availability of funds restricted to members of a particular sex. 65 Fed. Reg. 52872 at ï½§ .430(b)(2)(i). This means that a recipient cannot deny a scholarship or other financial assistance to an individual because the available monies are restricted to members of a particular sex. For example, recipients must select in a sex neutral fashion who is eligible for assistance. They are than free to allocate assistance to those selected individuals from among sex restricted scholarships. However, they cannot deny assistance to selected individuals because scholarships or other financial assistance is sex restricted.[92]

7. **Employment Assistance** (ï½§ ___.435)

A recipient who assists any agency, organization, or person in making employment available to its students must ensure that the employment is not provided in a discriminatory manner on the basis of sex. If the agency, organization, or person is offering employment in a discriminatory manner, the recipient must not assist such an agency, organization, or person by providing its employment service. 65 Fed. Reg. 52872 at ï½§ ____.435(a)(1),(2).

8. **Health and insurance benefits and services** (ï½§ .440)

Under the Title IX common rule, a recipient must not discriminate on the basis of sex in providing health and insurance benefits or services. Specifically, the provision of such benefits and services to students must meet the same requirements as outlined in the employee provisions of the common rule. 65 Fed. Reg. at 52873-52874. However, these provisions do not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service must provide gynecological care. 65 Fed. Reg. at 52872.

9. **Marital or Parental Status** (ï½§ ___.445)

A recipient must not apply any rule concerning a students actual or potential parental, family, or marital status that treats students differently on the basis of sex. 65 Fed. Reg. 52872 at ï½§ ___.445(a). A students pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery from such termination of pregnancy must be subjected to the same policies that a recipient applies to any other temporary disability in terms of medical or hospital benefits, service, plan, or policy available all students in a recipients education program or activity. 65 Fed. Reg. 52872 at ï½§ ___.445(b)(4). Where a recipient does not maintain a leave policy for its students, or where a student does not otherwise qualify for leave under a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence for as long a period of time as is deemed medically necessary by the students physician, at the conclusion of which the student shall be reinstated to the status that she held when the leave began. 65 Fed. Reg. 52872 at ï½§ ___.445(b)(5).

A recipient must not exclude any student from participating in its educational program or activity, including extracurricular activities, based on the students pregnancy, childbirth, false pregnancy, termination or pregnancy, or recovery from such termination, unless the student voluntarily requests to be excluded from the program or activity and placed in a separate portion of the program. 65 Fed. Reg. 52872 at ï½§ ___.445(b)(1).

In the context of high schools, at least two court decisions have addressed the issue of a pregnant students participation in extracurricular activities. In Wort v. Vierling, the local chapter of the National Honor Society dismissed a high school student who became pregnant. The high school officials claimed that she was removed from the honor society because of deficiency in character by engaging in pre-marital sex, not because of her pregnancy status. Vierling, No. 82-3169, slip op. (C.D. Ill. Sept. 4, 1984), affd on other grounds, 778 F.2d 1233 (7th Cir. 1985). The district court, properly in the Department of Justices view, rejected this claim and held that the student was excluded from participating in the honor society on the basis of her sex in violation of Title IX. Id.

Several years later, a high school student in Pennsylvania was also dismissed from the National Honor Society when she told school officials of her pregnancy. Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990). Here the court of appeals refused to overturn the district courts ruling in favor of the school district. According to the court, there was no clear factual error in the lower courts conclusion that the school officials dismissed the student because her leadership and character in the honor society were compromised when she engaged in pre-marital sex and not because of the resulting pregnancy from such conduct. Pfeiffer, 917 F.2d at 784 (1990). The court did, however, remand the case to the lower court to reconsider proffered testimony regarding a male honor society student who engaged in premarital sex, became a father, and married the mother of his child during high school, but was allowed to retain honor society membership. Id. at 785-786.

Under the Title IX regulations, a recipient is allowed to require students who are pregnant or have a related condition to obtain certification from a physician to confirm that a student is physically and emotionally able to continue participation in a recipients program. However, the recipient may only do so if such certification is required of all students for other physical or emotional conditions that require a physicians attention. 65 Fed. Reg. 52872 at ï½§ ___.445(b)(2). If a recipient provides a portion of its program or activity separately to a student who is pregnant or has a related condition and who voluntarily chooses such a program, the recipient must ensure that the separate portion is comparable to the program offered to students who are not pregnant. 65 Fed. Reg. 52872 at ï½§ ___.445(b)(3).

10. Athletics (ï½§ ___.450)

Title IX regulations provide that:

No person shall on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide such athletics separately on such basis.

65 Fed. Reg. 52872 at ï½§ ____.450(a).

The regulations also provide that:

a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

65 Fed. Reg. 52872 at ï½§ ____.450(b)

The regulations go on to provide that a recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal opportunity for members of both sexes. A number of factors are set forth to determine equality of opportunity including but not limited to the provision of equipment, scheduling of games and practice time, travel and per diem allowances, assignment and compensation of coaches, provision of locker rooms, provision of medical and training facilities, provision of housing and dining facilities and publicity. See 65 Fed. Reg. 52873 - 52874 at ï½§ ____.450(c).

The regulations give a recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary, secondary, and postsecondary school levels an adjustment period to come into compliance with these requirements. No such adjustment period is set forth for other recipients. See 65 Fed. Reg. 52873 at ï½§ ____.450(d).

For additional guidance on how the Department of Education has interpreted these provisions as they apply to traditional educational institutions see *Policy Interpretation-Title IX and Intercollegiate Athletics*, 45 C.F.R. Part 26 (1979); OCRs *Title IX Athletics Investigators Manual* (1990); and *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (1996)*; Guidance on the Awarding of Athletic Financial Assistance (OCR letter to Bowling Green, July 23, 1998).*

11. Textbooks and Curricular Material (ï½§ ___.455)

The Title IX regulations provide that the content of textbooks or the use of other curricular materials in any education program or activity are not actionable under Title IX. 65 Fed. Reg. 52873.

D. Sexual Harassment

1. Overview

Title IX protects students from sexual harassment in educational programs or activities operated by recipients of federal funding. The protection against sexual harassment derives from the general prohibitions against sex discrimination contained in the Title IX common rule at _.400. Those provisions state in relevant part:

(a)*General*. Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be subjected to discrimination under any . . . education program or activity operated by a recipient that receives Federal financial assistance.

(b) . . . in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such persons satisfies any requirement or condition for provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(6) Aid of perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit or service to students or employees:

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

65 F.R. 52870

Moreover, if a recipient discriminates on the basis of sex, it must take remedial action to overcome the effects of the discrimination. The common rule at _.110(a)provides:

(a) *Remedial action*. If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

65 F.R. 52866

A very comprehensive guidance document concerning sexual harassment in federally funded education programs and activities was issued by the Department of Education, Office for Civil Rights on March 13, 1997. A revised guidance document, with a request for comments, was issued on November 2, 2000. Department of Educations *Proposed Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 65 Feg. Reg. 66092 (2000) (the final Sexual Harassment Guidance is anticipated for a January 2001 publication)("Sexual Harassment Guidance"). The Sexual Harassment Guidance provides educational institutions that receive federal financial assistance from the Department of Education with information regarding the legal standards that should be used in investigating and resolving allegations of sexual harassment of students by school employees, other students, and third parties. The Sexual Harassment Guidance also can provide guidance for entities other than educational institutions that administer education and training programs covered by Title IX. Although some general principles are discussed below, readers should consult the Sexual Harassment Guidance for details on investigating sexual harassment complaints. To the extent that information in this Manual is construed to conflict with the Sexual Harassment Guidance, the Department of Education Sexual Harassment Guidance should be followed.

2. General Legal Standards, Relationship between Title IX and Title VII

As noted in the previous section on employment, courts generally apply standards established under Title VII regarding what constitutes discrimination to guide their interpretation in Title IX cases. Although, as discussed below, the Supreme Court held that the Title VII and Title IX standards for assessing a defendants liability for money damages in private litigation differ, similar standards have been applied in defining actionable misconduct. See, for example, Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977), affd 631 F. 2d 178 (2d Cir. 1980) (comparing sex discrimination in educational settings with sex discrimination in employment settings and deciding that *quid pro quo* sex harassment provides a cause of action under Title IX as it does under Title VII). Several years after the decision in Alexander, the Supreme Court declared that courts should accord Title IX "a sweep as broad as its language" when interpreting Title IXs scope. North Haven v. Bell, 456 U.S. at 521 (quoting United States v. Price, 383 U.S. 787, 801 (1966)(Congress use of the phrase "no person shall be subjected to discrimination" in Title IXs statutory language means that employees, as well as students, are covered by its antidiscrimination provision.) As a result, courts interpreted Title IX as prohibiting *hostile environment* harassment in cases involving employees of educational institutions receiving federal funds. See Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

As the body of Title IX sex harassment law has evolved, the definitions of what conduct constitutes sexual harassment have remained largely the same under Title IX and Title VII but the legal standards for assessing a defendants liability for damages in private litigation under the two statutes have begun to diverge. The Supreme Court has held that a school must be deliberately indifferent in the face of actual knowledge of the misconduct in order to be liable for money damages in private litigation under Title IX. Id. In contrast, under Title VII, an employer may be liable for money damages, under certain circumstances, for a supervisors harassment of a subordinate even without notice. See Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). For this reason, we will specifically note in this chapter if a case is based on Title VII.

Importantly, for purposes of administrative enforcement of Title IX and as a condition of receipt of federal financial assistance - as well as in private actions for injunctive relief -- if a recipient is aware, or should be aware, of sexual harassment, it must take reasonable steps to eliminate the harassment, prevent its recurrence and, where appropriate, remedy the effects. See Department of Educations Sexual Harassment Guidance.

a. Identity of Harasser

1. Employees

Title IX prohibits sexual harassment by teachers or other employees of the federally funded entity administering an education program or activity. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998)(school liable for money damages in private litigation under Title IX for teacher/student sex harassment if school had actual knowledge of the misconduct and was deliberately indifferent); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (coach/teacher sexual harassment of high school student actionable under Title IX).

2. Program participants

Title IX also prohibits sexual harassment of one participant by another participant in a program. See Davis v. Monroe County Board of Education, 526 U.S. 629 (fifth grade students claim of harassment by classmate could be actionable under Title IX).

b. Same-sex harassment

Title IXs prohibition of discrimination on the basis of sex can include protections against same-sex harassment. The Supreme Court has ruled that same-sex sexual harassment can constitute discrimination on the basis of sex under Title VII. See Oncale v. Sundowner Offshore Servs., et al, 523 U.S. 75 (1998) (male employees sexual harassment claim against former employer and against male supervisors and co-workers may be actionable under Title VII). Similarly, lower courts have held that Title IX applies even if the participant and harasser are of the same sex. Kinman v. Omaha Pub. Sch. Dist., 94 F. 3d 463 (8th Cir. 1996)(female students allegation of sexual harassment by female teacher sufficient to raise claim under Title IX); Doe v. Petaluma County Sch. Dist., 949 F. Supp. 1415 (N.D. Cal. 1996)(female junior high school students allegation of sexual harassment by other students, including both boys and girls, sufficient to raise a claim under Title IX).

c. Gender Harassment

While it is clear that discrimination in violation of Title IX must be "on the basis of sex," courts have held that subjecting an individual to sex stereotyping may constitute sex discrimination in appropriate circumstances. In Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989), a Title VII case, the plaintiff was denied partnership in an accounting firm, due, in part, to the attitudes of the senior partners who described her as "macho" and advised her to wear makeup and jewelry and to dress in more feminine clothing. Id. at 235. The Supreme Court explained:

> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender... As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the spectrum of disparate treatment of men and women result from sex stereotypes.

Id. at 250-51. (citations and internal quotations omitted).

Several circuit courts have also addressed gender-based harassment on the basis of stereotyping. Higgins v. New Balance Athletic Shoe, Inc., 194 F. 3d 252 (1st Cir. 1999)(Title VII); Galdieri-Ambrosini v. National Realty & Dev. Corp., 136 F. 3d 276, 289 (2nd Cir. 1998)(Title VII) ("Evidence of sexual stereotyping may provide proof that an employment decision or an abusive environment was based on gender.")(citing Price Waterhouse, 490 U.S. at 250-51 (Title VII); Lindahl v. Air France, 930 F. 2d 1434, 1439 (Title VII)(9th Cir. 1991); Sheehan v. Purolator, Inc., 839 F. 2d 99, 106-77 (Title VII)(2nd Cir.)(Kearse, J., dissenting, cert. denied, 488 U.S. 891, 109 S.Ct. 226 (1988)). Since Title VII legal theories are often used by courts to evaluate Title IX claims, sex stereotyping may violate the Title IX prohibition of discrimination on the basis of sex. The fact that the harassment was based on the perception that the individual was not properly "manly" or "feminine" may, in appropriate circumstances, be the basis for a sex stereotyping claim filed under Title IX.

d. Off-premises misconduct

Sexual harassment may be prohibited even when it does not occur on the program providers premises, as long as the off-premises activity during which the sexual harassment takes place relates to the covered educational program. Crandell, D.O. v. New York College of Osteopathic Med., 87 F. Supp. 2d 304 (S.D.N.Y. 2000)(off-campus misconduct actionable under Title IX where harassment occurred in clinic during the students paid internship). Thus, harassment that occurred off the premises of an education program operated by a recipient of federal assistance would be covered. For example, if a federally assisted museum conducted a lecture series which included field trips away from the museum, harassment that occurred on the field trips would be covered.

e. Appropriate Remedial Measures

Although courts have not yet ruled on what measures are appropriate for a recipient to take to remedy sex harassment in a context not involving an educational institution, the Department of Educations Sexual Harassment Guidance provides a starting point for analysis. If an educational provider determines that sexual harassment has occurred, it should take reasonable, timely, appropriate corrective action, including steps tailored to the specific situation. Sexual Harassment Guidance at 66104 - 66106. For example, the provider may need to counsel, warn, or take more serious disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents. Sexual Harassment Guidance at 66104. In some instances, it may be appropriate to further separate the harassed participant and the harasser, or direct the harasser to have no further contact with the participant. These corrective measures should be designed to minimize, as much as possible, the burden on the participant who was harassed. Id.

In some situations, a provider may be required to provide other services to the participant who was harassed, if necessary to address the effects of the harassment. For instance, if an instructor gave a low grade to a participant because the participant failed to respond to the teachers advances, the provider may be required to make arrangements for an independent assessment of the participants work and, if necessary, change the grade accordingly, make arrangements for the student to take the course again with a different instructor, provide tutoring and/or counseling, or take other measures that are appropriate under the circumstances. Id. In addition, the provider will also need to take steps to prevent the recurrence of harassment such as requiring the harasser to attend counseling, or even training the entire staff to ensure that they understand what types of conduct can cause sexual harassment and that they know how to respond. Id. at 66105. Under appropriate circumstances, the provider may find it necessary to terminate the harassers employment.

Furthermore, a policy specifically prohibiting sexual harassment and separate grievance procedures for violations of that policy can help ensure that all participants, instructors, employees, third parties, etc. understand the nature of sexual harassment and that the education program provider will not tolerate such conduct. Id.

V. Procedural Requirements for Complying with Title IX

The procedures outlined in this chapter are based on those provided in the Title IX common rule 65 F.R. 52867 (ï½§ï½§ ___.110 - ___.140). The procedural requirements discussed in this chapter are also codified in the Department of Education Title IX implementing regulations, 34 C.F.R. ï½§ 106.4 - 106.9. Where the Title IX common rule differs from the Department of Education regulation, we have so noted.[93]

A. Assurances (ï½§ ___.115)

An applicant for or recipient of federal financial assistance must submit a written assurance to the funding agency that it will operate all of its education programs or activities in compliance with Title IX and the Title IX implementing regulations. The assurance must be provided either at the application stage or the award stage.[94] It is important to note that by regulation this assurance must contain language that commits the applicant or recipient to undertake whatever remedial action is necessary to eliminate any existing sex discrimination or to eliminate the effects of past discrimination - whether that discrimination occurred prior to or subsequent to the submission of the assurance.

Generally, the assurance obligates the applicant or recipient to comply with Title IX for the period during which the federal funding is extended. However, with respect to real property provided to operate an education program or activity, the assurance obligates the recipient (or a subsequent transferee) for the period during which the real property is used to provide an education program or activity. Likewise, if the federal funding consists of personal property such as computers, copiers, etc., the assurance remains in effect for the entire time the recipient retains ownership or possession of the property.

The funding agency is responsible for designating the form of the assurance and the extent to which such assurances will be required of the applicants or recipients subgrantees, contractors, subcontractors, transferees, or successors in interest. However, the assurance must include language that obligates the applicant or recipient to "comply with all federal statutes relating to nondiscrimination. These include but are not limited to: Title IX of the Education Amendments of 1972, as amended (20 U.S.C. ï½§1681-1683, 1685-1688)." The Supreme Court has upheld a funding agencys regulatory power to terminate a recipients federal financial assistance for failure to execute an assurance of compliance with Title IX. Grove City College v. Bell, 465 U.S. at 574-575.

B. Self-evaluation (ï½§ ___.110)

Under the Department of Educations Title IX regulations, educational institutions must assess their current policies and procedures to determine whether those policies and procedures comply with Title IX and its implementing regulations within one year after the Title IX regulations apply to them; this is known as "the self-evaluation requirement." Educational institutions that have already fulfilled the self-evaluation requirements under the Department of Education Title IX regulations, 34 C.F.R. ï½§106.3(c), do not have to conduct a second self-evaluation under the Title IX common rule. Thus, for example, if an educational institution receives funds from the Department of Education and has already done its self-evaluation under EDs Title IX rule, and, as a result of the Title IX common rule, is now subject to the Title IX regulations of the General Services Administration and the Department of Interior from which it also receives assistance, the institution does not have to perform another self-evaluation.

It is important to note that the self-evaluation requirement in the Title IX common rule applies only to recipients that are educational institutions (i.e., elementary and secondary schools, high schools, colleges, universities, etc.) that receive federal financial assistance. It does not apply to other educational programs and activities. For example, a prison that receives federal funds from the Department of Justice to administer a vocational training program is not subject to this regulatory requirement.

An educational institution must evaluate its current policies and procedures as they affect the admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the providers education program or activity. To the extent these policies and procedures do not comply with the requirements of Title IX, the provider must: 1) modify the policies and procedures to bring them into compliance, and 2) take appropriate steps to remedy any discrimination that resulted from these practices. Further, an educational institution must keep records documenting the evaluation and any required modifications for at least three years and must be able to provide these documents to the funding agency upon request.

C. Dissemination of Policy (ï½§ ___.140)

Title IX requires all recipients to regularly and consistently notify the public i.e., participants, employees, applicants, etc. - that they do not discriminate on the basis of sex in the educational programs or activities that they operate. While the funding agency can determine the specific information to be contained in the notification, at a minimum the notice must state that the protection against sex discrimination also applies to employment in and admission to the program,[95] and that any questions regarding the application of Title IX can be referred to the recipients designated Title IX coordinator or to the funding agency.

The recipient must issue this notice within ninety days of the effective date of the Title IX implementing regulations or within ninety days of the date that the Title IX regulations apply to the recipient whichever is later. The recipient must publish this notice in any recipient-operated newspapers and magazines[96] or in the recipients student and alumni publications, and by letter or memorandum to participants and employees. After the initial publication, all memoranda, bulletins, catalogs, and applications must contain a similar notice. A recipient should make sure that this policy is widely distributed and easily understood.

D. Designation of Title IX Coordinator (ï½§ ___.135(a))

Recipients must designate at least one employee to serve as a Title IX coordinator. This individual is responsible for coordinating the recipients efforts to comply with and carry out its responsibilities under Title IX and its implementing regulations, including the investigation of any Title IX complaints against the recipient. The coordinators name, address, and phone number must be communicated to all applicants, participants, and employees.

E. Adoption of Grievance Procedures (ï½§ ___.135(b))

One of the important aspects of Title IX and its implementing regulations is their requirement that recipients adopt and publish internal grievance procedures to promptly and equitably resolve complaints alleging discrimination on the basis of sex. The responsibility lies with the recipient to establish and maintain a mechanism whereby program participants and employees may seek to redress illegal sex discrimination and whereby the recipient may continually be apprized of and evaluate possible discriminatory policies and procedures and develop strategies to correct discrimination. Although Title IX does not specify a structure for the implementation of a grievance procedure, the U.S. Department of Education has suggested some of the basic components of an effective Title IX grievance procedure in a manual that it has issued on this topic. See *Title IX Grievance Procedures: An Introductory Manual,* U.S. Department of Education, Office for Civil Rights (1987).

It is important to note that there is no private right of action for damages in the courts for a recipients failure to promulgate a grievance procedure under Title IX. Courts have held that failure to meet this requirement, by itself, does not amount to discrimination on the basis of sex. Gebser v. Lago Vista Sch. Dist., 524 U.S. 274, 292 (1998), Seamons v. Snow, 84 F. 3d 1226 (10th Cir. 1996).

Despite the lack of a private right of action in the courts concerning the lack of a grievance procedure, the requirement to establish a prompt and equitable grievance procedure can be enforced administratively by the funding agency. The Supreme Court has specifically affirmed the Department of Educations authority to administratively enforce this regulatory requirement. Gebser, 524 U.S. at 292.

VI. Federal Funding Agency Methods to Evaluate Compliance

The federal agency providing the financial assistance is primarily responsible for enforcing Title IX as it applies to its recipients. Agencies have several mechanisms available to evaluate whether recipients are in compliance with Title IX, and additional means to enforce or obtain compliance should a recipient's practices be found lacking. Evaluation mechanisms, discussed below, include pre-award reviews, post-award compliance reviews, and investigations of complaints. Because Title IX was patterned after Title VI, the Title IX common rule incorporated by reference the enforcement procedures set forth in the Title VI regulations. 65 Fed. Reg. 52858, 52860 (2000). Accordingly, this section references Title VI cases as well as the Title VI Coordination Regulations and the "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," (the "Title VI Guidelines"). See 28 C.F.R. ï½§ï½§ 42.101-42.412 and 28 C.F.R. ï½§ 50.3. The Assistant Attorney General for Civil Rights in a January 28, 1999 document entitled: *Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs*[97] relied on the Title VI Coordination Regulations for the guidance provided and specifically stated:

> This document was drafted specifically with reference to enforcement of Title VI, 42 U.S.C. ï½§ 2000d, et seq., which prohibits discrimination on the basis of race, color, and national origin in all Federal programs receiving Federal financial assistance. However, the principles set forth are equally applicable to Title IX of the Education Amendments of 1972, 20 U.S.C. ï½§ 1681, et seq., which prohibits discrimination on the basis of sex in education programs receiving Federal financial assistance; the federally assisted aspects of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. ï½§ 794, which prohibits discrimination on the basis of disability in both federally assisted and federally conducted programs; and various fund-granting statutes that contain prohibitions against discrimination.
>
> Note 1, January 28, 1999 Guidance Document

It is important to remember that the standard for an agency to determine whether a recipient has violated Title IX differs from the higher liability standard of proof that must be met in a court action before monetary damages are awarded. Recipients have an affirmative duty to correct Title IX violations even if no monetary damages would be awarded because of the violation. As the Supreme Court noted in Gebser, federal agencies have the power to "promulgate and enforce requirements that effectuate [Title IXs] nondiscrimination mandate," even in circumstances that would not give rise to a claim for money damages. Gebser, 524 U.S. at 292. Moreover, it is the position of the Department of Justice that the standards an agency follows in finding a violation and seeking voluntary corrective action also would apply to private actions for injunctive and other equitable (as opposed to monetary) relief. See brief of the United States as Amicus Curiae in Davis v. Monroe County.

A. Pre-Award Procedures

Agencies should endeavor to ensure that awards of federal financial assistance are only granted to entities that adhere to the substantive nondiscrimination mandates of Title IX and other nondiscrimination laws.

1. Assurances of Compliance

The Title IX common rule provides as follows:

> Either at the application stage or the award stage, Federal agencies must ensure that applications for Federal financial assistance contain, be accompanied by, or be covered by a specifically identified assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations.

65 Fed. Reg. 52867 ï½§___.115. Regulations requiring applicants to execute an assurance of compliance as a condition for receiving assistance are valid. Grove City College, 465 U.S. at 574-575 (Title IX assurances); Gardner v. Alabama, 385 F.2d 804 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968) (Title VI assurances). If an applicant refuses to sign a required assurance, the agency may deny assistance only after providing notice of the noncompliance, an opportunity for a hearing, and other statutory procedures. 42 U.S.C. ï½§ 2000d-1; 28 C.F.R. ï½§ 50.3 II.A.1. However, the agency need not prove actual discrimination at the administrative hearing, but only that the applicant refused to sign an assurance of compliance with Title IX (or similar nondiscrimination laws). Grove City College, 465 U.S. at 575. Assurances serve two important purposes: they remind prospective recipients of their nondiscrimination obligations, and they provide a basis for the federal government to sue to enforce compliance with these assurances. See United States v. Marion County Sch. Dist., 625 F.2d 607, 609, 612-13 (5th Cir.), reh'g denied, 629 F.2d 1350 (5th Cir. 1980), cert. denied, 451 U.S. 910 (1981).[98]

2. Deferral of the Decision Whether to Grant Assistance

The Title VI Guidelines specifically state that agencies may defer assistance decisions: "In some instances ... it is legally permissible temporarily to defer action on an application for assistance, pending initiation and completion of [statutory remedial] procedures - including attempts to secure voluntary compliance with title VI" (or Title IX). 28 C.F.R. ï½§ 50.3 I.A. Thus, deferral may occur while negotiations are ongoing to special condition the award, during the pendency of a lawsuit to obtain relief, or during proceedings aimed at refusing to grant the requested assistance.[99]

This interpretation is a reasonable, and even necessary, application of the statutory remedial scheme. The congressional authorization to obtain relief pre-award would be sharply reduced, if not rendered a near nullity, if agencies could not postpone the assistance decision while spending the time needed to conduct a full and fair investigation and while seeking appropriate relief. Furthermore, the Attorney General's administrative interpretation is entitled to deference. See, e.g., Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984).[100]

The Title VI Guidelines recommend that agencies adopt a flexible, case-by-case approach in assessing when deferral is appropriate, and consider the nature of the potential noncompliance problem. Where an assistance application is inadequate on its face, such as when the applicant has failed to provide an assurance or other material required by the agency, "the agency head should defer action on the application pending prompt initiation and completion of [statutory remedial] procedures." 28 C.F.R. ï½§ 50.3 II.A.1 (emphasis added). Where the application is adequate on its face but there are "reasonable grounds" for believing that the applicant is not complying with [Title IX], "the agency head may defer action on the application pending prompt initiation and completion of [statutory remedial] procedures." Id. II.A.2 (emphasis added).[101]

When action on an assistance application is deferred, remedial efforts "should be conducted without delay and completed as soon as possible." Id. I.A. Agencies should also be cognizant of the time involved in a deferral to ensure that a deferral does not become "tantamount to a final refusal to grant assistance." Id. II.C. The agency should not completely rule out deferrals where time is of the essence in granting the assistance, but should consider special measures that may be taken to seek expedited relief (e.g., by referring the matter to the Department of Justice to file suit for interim injunctive relief).

3. Pre-Award Authority of Recipients vis-a-vis Subrecipients

The Title VI Guidelines provide that the "same [pre-award] rules and procedures would apply" where a federal assistance recipient is granted discretionary authority to dispense the assistance to subrecipients. Id. III:

> [T]he Federal Agency should instruct the approving agency -- typically a State agency -- to defer approval or refuse to grant funds, in individual cases in which such action would be taken by the original granting agency itself . . . . Provision should be made for appropriate notice of such action to the Federal agency which retains responsibility for compliance with [Title IX compliance] procedures.

Id.

Thus, the Title VI Guidelines support federal agencies requiring that recipients/subgrantors obtain assurances of compliance from subrecipients.[102] When the recipient receives information pre-award that indicates noncompliance by an applicant for a subgrant, recipients may defer making the grant decision, may seek a voluntary resolution and, if no settlement is reached, (after complying with statutory procedural requirements), may refuse to award assistance.

4. Data Collection

Section 42.406(d) of the Title VI Coordination Regulations lists the types of data that should be submitted to and reviewed by federal agencies prior to granting funds. In addition to submitting an assurance that it will compile and maintain records as required, an applicant should provide: (1) notice of all lawsuits (and, for recipients, complaints) filed against it; (2) a description of assistance applications that it has pending in other agencies and of other federal assistance being provided; (3) a description of any civil rights compliance reviews of the applicant during the preceding two years; and (4) a statement as to whether the applicant has been found in noncompliance with any relevant civil rights requirements. Id.

The Title IX Common Rule incorporates agencies Title VI procedures, as each agency participating in the common rule has its own provision adopting the Title VI procedures.[103] See, e.g., 28 C.F.R. ï½§54.605 (Department of Justice); 15 C.F.R. ï½§8a.605 (Department of Commerce); 22 C.F.R. ï½§146.605 (Department of State); 29 C.F.R. ï½§36.610 (Department of Labor); 32 C.F.R. ï½§196.605 (Department of Defense). DOJs Title VI Coordinating Regulations require that agencies "shall make [a] written determination as to whether the applicant is in compliance with Title VI." 28 C.F.R. ï½§ 42.407(b). Where a determination cannot be made from the submitted data, the agency shall require the submission of additional information and take other steps necessary for making a compliance determination, which could include communicating with local government officials or community organizations and/or conducting field reviews. Id.

5. Recommendations Concerning Pre-award Reviews

It is recommended that agencies implement an internal screening process whereby agency officials are notified of potential assistance grants and are provided the opportunity to raise a "red flag" or concern about the potential grant recipient.[104] If limited resources are a problem, agencies should develop a system to target a significant proportion of assistance applications.[105]

As part of the Department of Justice's oversight and coordinating function, each agency should submit to the Department, as part of its annual implementation plan, any targeting procedures that are adopted.

B. Post-Award Compliance Reviews[106]

Federal agencies are required to maintain an effective program of post-award compliance reviews.[107] Federal agency Title VI regulations, which are incorporated into Title IX regulations,[108] reiterate this requirement.[109] Compliance reviews can be large and complex, or more limited in scope.

1. Selection of Targets and Scope of Compliance Review

Federal agencies have broad discretion in determining which recipients and subrecipients to target for compliance reviews. However, this discretion is not unfettered. In United States v. Harris Methodist Fort Worth, 970 F.2d 94 (5th Cir. 1992), the Fifth Circuit found that a Title VI compliance review involves an administrative search and, therefore, Fourth Amendment requirements for "reasonableness" of a search are applicable. The Court considered three factors: (1) whether the proposed search is authorized by statute; (2) whether the proposed search is properly limited in scope; and (3) how the administrative agency designated the target of the search. Id. at 101; United States v. New Orleans Pub. Serv. (NOPSI III), 723 F.2d 422 (5th Cir.) rehearing en banc denied, 734 F.2d 226 (5th Cir. 1984) (E.O. 11246 compliance review unreasonable) (citing United States v. Mississippi Power & Light Co., 638 F.2d 899 (5th Cir. 1981)); and First Alabama Bank of Montgomery, N.A., v. Donovan, 692 F.2d 714, 721 (11th Cir. 1982) (Exec. Order No. 11246 compliance review reasonable); But see Marshall v. Barlow's Inc., 436 U.S. 307 (1978).[110]

The Harris Court suggested that selection of a target for a compliance review will be reasonable if it is based either on (1) specific evidence of an existing violation, (2) a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]," or (3) a showing that the search is "pursuant to an administrative plan containing specific neutral criteria." Harris Methodist, 970 F.2d at 101 (internal citations omitted); NOPSI III, 723 F.2d at 425.

In Harris Methodist, the court rejected the Department of Health and Human Services (HHS) attempts to gain access to records, including a vast array of records associated with confidential, physician peer review evaluations, as part of a compliance review of the hospital. The court held that signing an assurance gives consent "only to searches that comport with constitutional standards of reasonableness." 970 F.2d at 100. Where the proposed compliance review was not subjected to management review and not based upon consideration of a management plan or objective criteria, the court of appeals agreed that the HHS official acted "arbitrarily and without an administrative plan containing neutral criteria." Id. at 103.

Thus, agencies are cautioned that they should not select targets randomly for compliance reviews but, rather, they should base their decisions on neutral criteria or evidence of a violation. A credible complaint can serve as specific evidence suggesting a violation that could trigger a compliance review.

In developing targets for compliance reviews, agencies may wish to take into consideration the following:

- Issues targeted in the agencys strategic plan, if any;
- Issues frequently identified as problems faced by a particular recipients program beneficiaries;
- Geographical areas the agency wishes to target because of the many known problems beneficiaries are experiencing or because the agency has not had a "presence" there for some time;
- Issues raised in a complaint or identified during a complaint investigation that could not be covered within the scope of the complaint investigation;
- Problems identified to the agency by community organizations or advocacy groups that cite actual incidents to support their concerns;
- Problems identified to the agency by its block grant recipients;[111] and
- Problems identified to the agency by other federal, State, or local civil rights agencies.

Apart from complying with the standards outlined above, it is recommended that a decision to conduct a compliance review be set forth in writing and approved by senior civil rights management. An agency may be required to show that it has selected its targets for compliance reviews in an objective, reasonable manner. A contemporaneous, written record that reflects the factors considered will aid in refuting allegations of bias or improper targeting of a recipient. See NOPSI III, 723 F.2d at 428. The written record should identify any regulations or internal guidance that set forth criteria for selection of targets for compliance reviews, and explain how such criteria are met.

2. Procedures for Compliance Reviews

Agency Title VI regulations (incorporated into Title IX regulations) are silent as to procedures for conducting compliance reviews, although, as discussed, the Title VI Coordination Regulations provide general guidance as to the types of information to solicit. Federal agencies granting federal financial assistance are required to "establish and maintain an effective program of post-approval compliance reviews" of recipients to ensure that the recipients are complying with the requirements of Title VI. 28 C.F.R. ï½§ 42.407(a). Related to the reviews themselves, recipients should be required to submit periodic compliance reports to the agencies and, where appropriate, conduct field reviews of a representative number of major recipients. Finally, the Title VI Coordination Regulations recommend that agencies consider incorporating a Title VI component into general program reviews and audits. 28 C.F.R. ï½§ 42.407(c)(1).[112] These Title VI requirements are applicable to Title IX as well.

Results of post-approval reviews by the federal agencies should be in writing and include specific findings of fact and recommendations. The determination by the federal agency of the recipient's compliance status shall be made as promptly as possible. 28 C.F.R. ï½§ 42.407(c).

C. Complaints

The Title VI Coordination Regulations require that federal agencies establish procedures for the "prompt processing and disposition" of complaints of discrimination in federally funded programs. 28 C.F.R. ï½§ 42.408(a). Agency regulations with respect to procedures for the investigation of complaints of discriminatory practices, however, are typically brief, and lack details as to the manner or time table for such inquiry. See, e.g., 28 C.F.R. ï½§ 42.107; 32 C.F.R. ï½§ 195.8. Generally, by regulation, an agency will allow complainants 180 days to file a complaint, although the agency may exercise its discretion and accept a complaint filed later in time. See, e.g., 28 C.F.R. ï½§ 42.107(b). An agency is not obliged to investigate a complaint that is frivolous, has no apparent merit, or where other good cause is present, such as a pending law suit. An investigation customarily will include interviews of the complainant, the recipient's staff, and other witnesses; a review of the recipient's pertinent records, and consideration of the evidence gathered and defenses asserted. If the agency finds no violation after an investigation, it must notify, in writing, the recipient and the complainant, of this decision. See, e.g., 28 C.F.R. ï½§ 42.107(d)(2). If the agency believes there is adequate evidence to support a finding of noncompliance, the first course of action for the agency is to seek voluntary compliance by the recipient. See, e.g., 28 C.F.R. ï½§ 42.107(d)(1). If the agency concludes that the matter cannot be resolved through voluntary negotiations, the agency must make a formal finding of noncompliance and seek enforcement, either through judicial action or administrative fund suspension.

If an agency receives a complaint that is not within its jurisdiction, the agency should consider whether the matter may be referred to another federal agency that has or may have jurisdiction, or to a State agency to address the matter. 28 C.F.R. ï½§ 42.408(a)-(b). If a recipient is required or permitted by a federal agency to process Title IX complaints, such as under certain block grant programs, the federal agency must ascertain whether the recipients procedures for processing complaints are adequate. In such instances, the Title VI Coordination Regulations, which agencies with Title IX responsibilities can look to for guidance, require that the federal agency obtain a written report of each complaint and investigation processed by the recipient, and retain oversight responsibility regarding the investigation and disposition of each complaint. 28 C.F.R. ï½§ 42.408(c).

Where an agency receives a complaint about a recipient that is funded by more than one federal agency, the funding agency may avoid duplicative compliance and enforcement procedures by sharing or delegating compliance information and enforcement responsibilities. Section 1-207 of Executive Order 12250 authorizes the Attorney General to initiate cooperative programs and agreements between federal agencies to promote the effective enforcement of, inter alia, Title VI and IX. See also, 28 C.F.R. ï½§ï½§ 42.401-415.

Many agencies that fund entities that operate educational programs or activities have Title VI delegation agreements with the Department of Education (ED). However, only two of these agencies, the National Aeronautics and Space Administration and the Environmental Protection Agency, have Title IX delegation agreements with ED. Delegation Agreements help to avoid duplicative enforcement efforts since they give to lead agencies responsibilities for conducting investigations when more than one agency has jurisdiction over a case. The Federal Coordination and Compliance Section of the Civil Rights Division is currently developing a comprehensive Title IX and Title VI interagency Delegation Agreement to include the remaining federal agencies that do not have Title IX delegation agreements.

Finally, the Title VI Coordination Regulations require that each federal agency, (and recipients that process Title VI complaints), maintain a log of complaints received. 28 C.F.R. ï½§ 42.408(d). The log shall include the following: the sex of the complainant, the identity of the recipient, the nature of the complaint, the date the complaint was filed, the investigation completed, the date and nature of the disposition, and other pertinent information.

VII. Federal Funding Agency Methods to Enforce Compliance

Agency staff should remember that the primary means of enforcing compliance with Title IX is through voluntary agreements with the recipients, and that fund suspension or termination is a means of last resort.[113] This approach is set forth in the statute, is a reflection of congressional intent, and is recognized by the courts. See 42 U.S.C. ï½§ 2000d-1; Board of Pub. Instruction of Taylor County, Fla. v. Finch, 414 F.2d 1068, 1075 n.11 (5th Cir. 1969) (citing 110 Cong. Rec. 7062 (1964) (Statement of Sen. Pastore)). Accordingly, if an agency believes an applicant is violating Title IX, the agency has three potential remedies:

(1) resolution of the noncompliance (or potential noncompliance) "by voluntary means" by entering into an agreement with the applicant, which becomes a condition of the assistance agreement; or

(2) where voluntary compliance efforts are unsuccessful, a refusal to grant or continue the assistance; or

(3) where voluntary compliance efforts are unsuccessful, referral of the violation to the Department of Justice for judicial action. 42 U.S.C. ï½§ 2000d-1. In addition, agencies may defer the decision whether to grant the assistance pending completion of a Title IX investigation, negotiations, or other action to obtain remedial relief.[114]

A. Efforts to Achieve Voluntary Compliance

Under Title IX, before an agency initiates administrative or judicial proceedings to compel compliance, it must attempt to obtain voluntary compliance from a recipient.

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient . . . or (2) by any other means authorized by law: *Provided, however,* that no such action shall be taken until the department or agency concerned . . . has determined that compliance cannot be secured by voluntary means.

42 U.S.C. ï½§ 2000d-1 (emphasis in original); see Alabama NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346, 351 (M.D. Ala. 1967) (voluntary compliance is to be effectuated if possible). Both the Title VI Coordination Regulations and the Title VI Guidelines urge agencies to seek voluntary compliance before, and throughout, the administrative or judicial process.[115] See 28 C.F.R. ï½§ 42.411(a) ("Effective enforcement of Title VI requires that agencies take prompt action to achieve voluntary compliance in all instances in which noncompliance is found."); 28 C.F.R. ï½§ 50.3 I.C.

Title VI requires that a concerted effort be made to persuade any noncomplying applicant or recipient voluntarily to comply with Title VI. Efforts to secure voluntary compliance should be undertaken at the outset in every noncompliance situation and should be pursued through each stage of enforcement action. Similarly, when an applicant fails to file an adequate assurance or apparently breaches its terms, notice should be promptly given of the nature of the noncompliance problem and of the possible consequences thereof, and an immediate effort made to secure voluntary compliance. Id.

An agency is not required to make formal findings of noncompliance with Title IX before undertaking negotiations or reaching a voluntary agreement to end alleged discriminatory practices. However, there must be a basis for an agency and recipient to enter into such a voluntary agreement (e.g., identification of alleged discriminatory practices, even if the parties do not agree as to the extent of such practices).[116] In addition, throughout the negotiation process, agencies should be prepared with sufficient evidence to support administrative or judicial enforcement should voluntary negotiations fail.

An agency must balance its duty to permit informal resolution of findings of noncompliance against its duty to effectuate, without undue delay, the national policy prohibiting continued assistance to programs or activities which discriminate. Efforts to obtain voluntary compliance should continue throughout the process, but should not be allowed to become a device to avoid compliance.[117] Once an area of noncompliance is identified, an agency is required to enforce Title IX.

1. Voluntary Compliance at the Pre-Award Stage

a. Special Conditions

As is done post-award, agencies may obtain compliance "by voluntary means" in the pre-award context by entering into an agreement with the applicant that enjoins the applicant from taking specified actions, requires that specified remedial actions be taken, and/or provides for other appropriate relief. The terms of the agreement become effective once the assistance is granted, and typically are attached as a special condition to the assistance agreement. Three issues arise by exercise of the voluntary compliance authority at the pre-award stage: what is the appropriate scope of special remedial conditions; what is the remedy if an applicant refuses to agree to a special condition proposed by an agency; and what is the remedy if, post-award, the recipient fails to comply with a special remedial condition of the assistance agreement.

When voluntary compliance is sought at the pre-award stage, agencies may exercise heightened flexibility in designing appropriate remedial conditions, for two reasons. First, if the pre-award remedy does not fully resolve the discrimination concern, agencies may have the opportunity to rectify this matter during the life of the assistance grant. Second, since a pre-award investigation and remedial efforts likely would require a deferral of the assistance award, it may be in the interest of the applicant (as well as potentially the agency) that interim measures be agreed to that allow the award to go forward while also addressing the discrimination concern. Thus, a pre-award special condition may grant provisional relief, require that certain aspects of the recipient's program be monitored, and/or require that the recipient provide additional information relating to the discrimination allegations. Of course, the mere fact that relief may be sought post-award does not necessarily mean that full relief, using voluntary means or otherwise, should not be sought pre-award.

Agency authority to attach special conditions to assistance agreements extends no further than the agencys authority to seek voluntary compliance. Thus, if an applicant refuses to agree to a proposed special remedial condition, the agency either would have to negotiate a different condition, award the assistance without the condition, seek to obtain compliance "by any other means authorized by law," or initiate administrative procedures to refuse to grant assistance. However, an agency may not refuse to grant assistance based solely on an applicants refusal to accept a special condition unless the agency is prepared to make a finding of noncompliance and proceed to an administrative hearing. This is because the applicant has a right to challenge, through an administrative hearing, a refusal to grant assistance. See 42 U.S.C. ï½§ 2000d-1.

Whether an agency may immediately suspend payment based on noncompliance with a previously imposed special remedial condition depends on the terms of the condition. As a general matter, if a recipient violates the terms of a special remedial condition, the noncompliance must be remedied in the same manner that any other post-award noncompliance is addressed -- through voluntary efforts, by the government filing suit, or by the agency suspending or terminating the assistance pursuant to the statutory procedure. If, however, as part of the remedial condition the applicant agrees that the agency immediately may suspend payment if noncompliance occurs, then that contractual provision would likely supersede the statutory protection against instant fund suspension that the recipient otherwise enjoys.

b. Use of Cautionary Language

If an agency has evidence at the time of the award which does not rise to the level of an actual violation by an applicant, and thus does not warrant refusal of a grant award, the agency may consider notifying the recipient in the grant award letter that the agency has a civil rights concern. The statement could acknowledge, where appropriate, the applicant's cooperation with an ongoing civil rights investigation or its attempts to resolve the concern.[118] By including this language, the applicant is on notice that there may be a potential problem and that the funding arm is aware of what the civil rights arm is doing. It also warns that a failure to cooperate could lead to a denial of funds. The language also may encourage the applicant to enter into voluntary compliance negotiations and engage in alternative dispute resolution, in appropriate cases, to resolve the alleged discrimination at issue without a formal finding or the completion of an investigation. A major advantage of this approach is that it avoids the due process concerns raised when deferral or special conditioning is utilized because, in this case, the funds are being awarded, i.e., there is no "refusal to grant," which would trigger the right to an administrative hearing.

c. Other Nonlitigation Alternatives

The Title VI Guidelines list four other approaches, short of litigation or fund termination, that may be available when civil rights concerns are discovered. The possibilities listed include:

(1) consulting with or seeking assistance from other Federal agencies . . . having authority to enforce nondiscrimination requirements; (2) consulting with or seeking assistance from State or local agencies having such authority; (3) bypassing a recalcitrant central agency applicant in order to obtain assurances from or to grant assistance to complying local agencies; and (4) bypassing all recalcitrant non-Federal agencies and providing assistance directly to the complying ultimate beneficiaries.

28 C.F.R. ï½§ 50.3 I.B.2. Agencies that enforce Title IX are urged to consider all of these options, as appropriate.

B. "Any Other Means Authorized by Law:" Judicial Enforcement

The Department of Justice's statutory authority to sue in federal district court on behalf of an agency for violation of Title VI (and, likewise, Title IX) is contained in the phrase "by any other means authorized by law." See 42 U.S.C. ï½§ 2000d-1; United States v. City and County of Denver, 927 F. Supp. 1396, 1400 (D. Colo. 1996); Ayers v. Allain, 674 F. Supp. 1523, 1551 n.6 (N.D. Miss. 1987); Marion County, 625 F.2d at 612-13 & n.14. In addition, the Department of Justice may pursue judicial enforcement through specific enforcement of assurances, certifications of compliance, covenants attached to property, desegregation or other plans submitted to the agency as conditions of assistance, or violations of other provisions of the Civil Rights Act of 1964, other statutes, or the Constitution. See Marion County, 625 F.2d at 612; 28 C.F.R. ï½§ 50.3 I.B.

Agency regulations interpreting this phrase provide for several options including: 1) referral to the Department of Justice for proceedings, 2) referrals to State agencies, and 3) referrals to local agencies. E.g., 29 C.F.R. ï½§ 31.8(a) (Labor); 34 C.F.R. ï½§ 100.8 (Education); and 45 C.F.R. ï½§ 80.8(a) (HHS):

[C]ompliance may be effected by . . . other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or contractual undertaking and (2) any applicable proceedings under State or local law.

In order to refer a matter to the Justice Department for litigation, agency regulations require that the funding agency make a finding that a violation exists and a determination that voluntary compliance cannot be achieved. The recipient must be notified of its failure to comply and must be notified of the intended agency action to effectuate compliance.[119] Some agency regulations require additional time after this notification to the recipient to continue negotiation efforts to achieve voluntary compliance.[120] It should be noted that the funding agency must in fact formally initiate referral of the matter to the Justice Department, because there is no automatic referral mechanism.

In United States v. Baylor Univ. Med. Ctr., 736 F.2d 1039 (5th Cir. 1984), the Fifth Circuit held that when a referral is made to the Department of Justice, and suit for injunctive relief is filed, a court can order termination of federal financial assistance as a remedy. However, the termination cannot become effective until 30 days have passed. The court reasoned that the congressional intent to allow a 30-day period when the administrative hearing route is followed (see 42 U.S.C. 2000d-1, which provides that the agency must file a report with Congress and 30 days must elapse before termination of the funds) evinces a congressional intent to likewise permit a 30-day grace period before a courts order to terminate funds takes effect.

C. Fund Suspension and Termination

Several procedural requirements must be satisfied before an agency may deny or terminate federal funds to an applicant/recipient. A four step process is involved:

1) the agency must notify the recipient that it is not in compliance with the statute and that voluntary compliance cannot be achieved;

2) after an opportunity for a hearing on the record, the "responsible Department official" must make an express finding of failure to comply.

3) the head of the agency must approve the decision to suspend or terminate funds; and

4) the head of the agency must file a report with the House and Senate legislative committees having jurisdiction over the programs involved and wait 30 days before terminating funds.[121] The report must provide the grounds for the decision to deny or terminate the funds to the recipient or applicant. 42 U.S.C. ï½§ 2000d-1; 20 U.S.C. ï½§ 1682; See, e.g., 45 C.F.R. ï½§ 80.8(c) (HHS).

1. Fund Termination Hearings

As noted above, funds may not be terminated without providing the recipient an opportunity for a formal hearing. See, e.g., 28 C.F.R. ï½§ 42.109(a). If the recipient waives this right, a decision will be issued by the "responsible Department official" based on the record compiled by the investigative agency. Hearings on terminations cannot be held less than 20 days after receipt of notice of the violation. See, e.g., 45 C.F.R. ï½§ 80.9(a) (HHS).

Agencies have adopted the procedures of the Administrative Procedures Act for administrative hearings. See, e.g., 28 C.F.R. ï½§ 42.109(d) (Justice); 45 C.F.R. ï½§ 80.9 (HHS). Technical rules of evidence do not apply, although the hearing examiner may exclude evidence that is "irrelevant, immaterial, or unduly repetitious." See, e.g., 28 C.F.R. ï½§ 42.109(d); 45 C.F.R. ï½§ 80.9(d)(2)(HHS). The hearing examiner may issue an initial decision or a recommendation to the "responsible agency official." See, e.g., 28 C.F.R. 42.110. The recipient may file exceptions to any initial decision. In the absence of exceptions or review initiated by the "responsible department official," the hearing examiner's decision will be the final decision. A final decision that suspends or terminates funds, or imposes other sanctions, is subject to review and approval by the agency head. Upon approval, an order shall be issued that identifies the basis for noncompliance, and the action(s) that must be taken in order to come into compliance. A recipient may request restoration of funds upon a showing of compliance with the terms of the order, or if the recipient is otherwise able to show compliance with Title VI or Title IX. See, e.g., 28 C.F.R. ï½§ 42.110; 45 C.F.R. ï½§ 80.10(g). The restoration of funds is subject to judicial review. 42 U.S.C. ï½§ 2000d-2; 20 U.S.C. ï½§ 1682. Moreover, as noted above, no funds may be terminated until 30 days after the agency head files a written report on the matter with the House and Senate committees having legislative jurisdiction over the program or activity involved. 42 U.S.C. ï½§ 2000d-1; 20 U.S.C. ï½§ 1682.

2. Agency Fund Termination Limited to the Particular Political Entity, or Part Thereof, that Discriminated

Congress specifically limited the effect of fund termination by providing that it

...shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, ...

42 U.S.C. ï½§ 2000d-1; 20 U.S.C. ï½§ 1682. This is called the "pinpoint provision." As discussed below, the CRRA did not modify interpretations of this provision, but affected only the interpretation of "program or activity" for purposes of coverage of Title IX (and related statutes). See S. Rep. No. 64 at 20, reprinted in 1988 U.S.C.C.A.N. at 22.

Congress' intent was to limit the adverse effects of fund termination on innocent beneficiaries and to insure against the vindictive or punitive use of the fund termination remedy. Finch, 414 F.2d at 1075.[122] "The procedural limitations placed on the exercise of such power were designed to insure that termination would be 'pinpoint(ed) . . . to the situation where discriminatory practices prevail.'" Id.(quoting 1964 U.S.C.C.A.N. 2512).

The seminal case on this issue is Finch, 414 F.2d 1068. A Department of Health, Education, and Welfare (HEW) hearing officer had found that the school district had made inadequate progress toward student and teacher desegregation and that the district had sought to perpetuate the dual school system through its construction program. Based on these findings, a final order was entered terminating "any class of Federal financial assistance" to the district "arising under any Act of Congress" administered by HEW, the National Science Foundation, and the Department of the Interior. Id. at 1071.

On appeal, the Fifth Circuit vacated the termination order, holding that it was in violation of the purpose and statutory scope of the agency's power. The "programs" in issue were three education statutes, yet the HEW officer had not made any specific findings as to whether there was discrimination in all three programs, and/or if action in one program tainted, or caused discriminatory treatment in, other programs. Id. at 1073-74, 79. The court paid considerable attention to the congressional intent of the pinpoint provision: limiting the termination power to "activities which are actually discriminatory or segregated" was designed to protect the innocent beneficiaries of untainted programs. Id. at 1077. The court further held that it was improper to construe Section 602 as placing the burden on recipients to limit the effect of termination orders by proving that certain programs are untainted by discrimination, rather than on an agency to establish the basis for findings as to the scope of discrimination. Id.

As to the meaning of the term "program" in the pinpoint proviso, the court concluded that the legislative history of Title VI evidenced a congressional intent that the term refer not to generic categories of programs by a recipient, but rather to specific programs of assistance, or specific statutes, administered by the federal government. Id. at 1077-78.[123] Further, even if "program" was meant to refer to generic categories of aid, the parenthetical phrase, "or part thereof", must be given meaning. Thus, an agency's fund termination order must be based on program-specific (i.e., grant statute specific) findings of noncompliance. The Court reasoned that:

[T]he purpose of the Title VI [fund] cutoff is best effectuated by separate consideration of the use or intended use of federal funds under each grant statute. If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a "political entity or part thereof"), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends.

Id. at 1078.[124]

The specificity required for fund termination was also addressed by the Seventh Circuit in Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972). In Gautreaux, the court reversed a district court's order approving federal fund termination for a Housing and Urban Development (HUD) program where there were no findings of discrimination in such program, and where such action was pursued in an effort to pressure action to remedy the defendant's discriminatory conduct in a wholly separate HUD program. Id. at 127-128. The district court had previously found that defendants had violated fair housing laws yet intended to withhold Model Cities Program funds, which primarily support education, job training, and day care programs on behalf of low and moderate income families. Although a small portion of Model Cities money also supported public housing, there was no allegation or finding that any Model Cities program was operated in a discriminatory fashion. Id. at 126-27. Accordingly, the court of appeals held that the district court violated Section 602 of Title VI and the "mandate of" Finch, and abused its discretion in withholding the Model Cities funds. Id. at 128.

It is equally critical to note that, notwithstanding the need for an independent evaluation of each program, an agency (or reviewing court) must examine not only whether the Federal funds are "administered in a discriminatory manner, . . . [but also] if they support a program which is infected by a discriminatory environment." Finch, 414 F.2d 1068, 1078-79 (emphasis added). Not all programs operate in isolation. Thus,

the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the [overall operation, e.g., school system] that it thereby becomes discriminatory.

Id. at 1079; see North Haven, 456 U.S. at 539 (approval of HEW Title IX regulations that adopt the Finch "infection" standard.) This latter analysis is often referred to as the "infection theory." Although Finch and Gautreaux were decided prior to passage of the CRRA, it is important to recognize that while the CRRA defined the meaning of "program or activity" for purposes of prohibited conduct, it did not change the definition of such terms for purposes of fund termination for a violation of Title IX. In particular, the CRRA left intact the "pinpoint" provision that limits any fund termination to the "program, or part thereof, in which noncompliance has been so found." 42 U.S.C. ï½§ 2000d-1.

VIII. Private Right of Action and Individual Relief through Agency Action

The Supreme Court has established that individuals have an implied private right of action under Title IX (and Title VI and Section 504). The Court has stated that it has "no doubt that Congress...understood Title VI as authorizing an implied private right of action for victims of illegal discrimination." See Cannon v. University of Chicago, 441 U.S. 677 (1979) (holding that an individual has a private right of action under Title IX). In addition, several courts of appeals have held that plaintiffs have a private right of action to enforce the disparate impact regulations implementing Section 602 of Title VI. See Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1253 (M.D. Ala. 1998), affd, 197 F.3d 484 (11th Cir. 1999), cert. granted sub. nom. Alexander v. Sandoval, ___ U.S. ___, 121 S. Ct. 28, 2000 WL 718812 (U.S. Sep 26, 2000)(NO. 99-1908); Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999).

In Sandoval, the court found that a reading of Lau, Guardians, and Alexander, *in pari materia* supported the finding of an implied private cause of action under Section 602 of Title VI. 197 F.3d 484, 507 (11th Cir. 1999). Likewise, in Powell v. Ridge, 189 F.3d 387, 397-400 (1999), the Third Circuit Court of Appeals recognized an implied private right of action to enforce regulations promulgated pursuant to Section 602 of Title VI. The Second Circuit, however, declined to reach the issue of whether a private right of action may be brought under regulations implementing Section 602 and let stand the lower courts ruling that a private right of action is not available to plaintiffs bringing suit pursuant to Section 602. New York City Envtl. Justice Alliance v. Giuliani, 214 F.3d 65, 72-73 (2d Cir. 2000) revd on other grounds, 50 F.Supp. 2d 250 (1999). The Supreme Court will likely definitively decide this issue when it hears Sandoval. Because Title IX was derived from Title VI, the Supreme Courts decision in this matter will impact the judicial interpretation of Title IX.

Many circuits have ruled that individuals may not bring suit against the federal government for failure to enforce Title IX (and Section 504 and Title VI). See Jersey Heights Neighborhood Assn v. Glendening et al., 174 F.3d 180 (4th Cir. 1999); Washington Legal Found. v. Alexander, 984 F.2d 483, (D.C. Cir. 1993); Womens Equity Action League v. Cavazos (WEAL II), 906 F.2d 742 (D.C. Cir. 1990). In Jersey Heights, plaintiffs, African-American landowners, filed suit against the U.S. Department of Transportation, among others, claiming that it abdicated its duties under section 602 of Title VI to eliminate discrimination in federally-funded programs by failing to terminate funds to recipients who failed to comply with Title VI. The Fourth Circuit found that Title VI provides two avenues of recourse to address discrimination by federal funding agencies: private right of action against recipients of federal financial assistance and petition to the federal funding agency to secure voluntary compliance by its recipients. After reviewing the legislative history of Title VI, the court concluded that Congress did not intend for aggrieved parties "to circumvent that very administrative scheme through direct litigation against federal agencies." 174 F.3d at 191.

Similarly, the court in WEAL II, ruled that, absent congressional authorization, individuals do not have a private right of action against the federal government under Title VI, Title IX, or Section 504.[125] 906 F.2d at 752. Citing the Supreme Courts examination of the legislative history of Title VI in Cannon, the court found that Congress did not intend for private suits to be brought against the federal funding agencies. Id. at 748. The WEAL II court further concluded that because individuals already have an adequate remedy through private rights of action against the recipients of federal financial assistance, individuals could not maintain a cause of action against the federal funding agency to compel enforcement of Title VI under the Administrative Procedure Act, the Mandamus Act, or the Constitution. Id. at 752. One possible exception to these court rulings might be a situation where the federal funding agency makes a finding that a recipient is in violation of Title VI but, nonetheless, refuses to enforce its own determination. See Washington Legal Found. v. Alexander,[126] 984 F.2d at 488.

The most common form of relief sought and obtained through a private right of action is an injunction ordering a recipient to do something. See Cannon, 441 U.S. 667. See also, United States v. Baylor Univ. Med. Ctr., 736 F.2d at 1050, in which the Fifth Circuit held that a court can order termination of federal financial assistance as a remedy. The Supreme Court also has held that individuals may obtain monetary damages for claims of intentional discrimination under Title IX. See Franklin, 503 U.S. at 75 n.8. As discussed below, agencies are encouraged to identify and seek the full complement of relief for complainants and identified victims, where appropriate, as part of voluntary settlements, including, where appropriate, not only the obvious remedy of back pay for certain employment discrimination cases, but also compensatory damages for violations in a nonemployment context. Agencies are also asked to recommend the scope of relief to be sought in referrals of matters to the Department of Justice for judicial enforcement.

A. Entitlement to Damages for Intentional Violations

As noted above, in addition to agency enforcement mechanisms, private individuals have an implied right of action under Title IX and damages may be available in such lawsuits. In Cannon, 441 U.S. 677, a female applicant who was denied admission to two medical schools brought a private lawsuit against the schools alleging violations of Title IX. The Supreme Court in Cannon reasoned that since Title IX had been patterned after Title VI and Title VI had previously been construed to allow a private right of action, that Congress intended similar remedies to be available under Title IX. The important point is that the court determined that exhaustion of administrative remedies was not required under Title IX. The court recognized that although the available administrative remedy (termination of funds) may be appropriate to prevent the use of federal funds to support discriminatory practices, it may not be appropriate as a remedy in cases in which an individual needs reinstatement or other protection against discriminatory practices. "The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent withand in some cases even necessary tothe orderly enforcement of the statute. Id. at 706-707. In addition, the Supreme Court has ruled that monetary damages are an available remedy in private actions brought to enforce Title IX for alleged intentional violations. See Franklin, 503 U.S. at 72-75, Consolidated Rail Corp. v. Darrone, 465 U.S. 624 at 630-31 (1984).

Franklin contains a detailed discussion on the merits of allowing monetary damages for intentional violations of Title IX. Id. at 71-76. The Court placed great reliance on the "longstanding rule" that where a federal statute provides (expressly or impliedly) for a right to bring suit, federal courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." Id. at 66.[127] The Court found no congressional intent to abandon this presumption in the enforcement of Title IX.[128] Accordingly, the Court concluded that private individuals may obtain damages in appropriate cases.

Throughout its opinion, the Franklin Court broadly referred to the relief being sanctioned as "monetary damages." Although the Court did not define this term, it specifically rejected limiting Title IX plaintiffs to monetary relief that is equitable in nature, such as backpay. See Id. at 75-76.

B. Availability of Monetary Damages in Other Circumstances

In Franklin, the Supreme Court was not called upon to rule whether monetary damages are available where other types of discrimination are proven. Nonetheless, the Court noted that unintentional discrimination may present a different legal question, and damages may not be available. Id. at 74.[129] Awarding damages may be particularly problematic where the violation rests on a "disparate impact" theory of discrimination. See Guardians, 463 U.S. at 595-603 (Opinions of White, J.).

C. Recommendations for Agency Action

In incorporating the damages remedy into agency compliance activities, agencies will need to decide when damages should be sought as part of a voluntary compliance agreement and, if damages, are requested, the amount of emphasis to be placed on the damages request in compliance negotiations. Agencies will want to ensure that the damages remedy is implemented in a manner consistent with other enforcement goals and policies, in a manner consistent among compliance agreements, and in a manner that protects the flexibility of the voluntary compliance process. To effectuate these goals, agencies may wish to draft written guidelines, and establish special supervisory procedures and internal reporting requirements.

There are several considerations that may be relevant in deciding how to exercise administrative discretion in applying the damages remedy in particular cases. One factor may be the degree of seriousness of the violation. A second factor may be whether the injury is substantial. A third factor may be whether the injury is pecuniary in nature. Since pecuniary losses represent a concrete injury and are relatively straightforward to measure, they may represent a type of loss for which damages almost always should be sought. Injuries involving "emotional distress" also should be addressed, but may require closer analysis. A fourth factor may be whether the discrimination victim has a current, ongoing relationship with the recipient that involves regular interactions between the two. If such a relationship exists and prospective relief is obtained that benefits the victim, that may weigh against providing compensation for any nonpecuniary injury that is relatively slight.

Another issue is how agencies should respond to requests by recipients that discrimination victims sign a liability release in order to obtain a damages award through a compliance agreement. As a practical matter, agencies likely will need to be open to including such a release in any agreement that provides for damages, if requested by the recipient.

D. Lack of States Eleventh Amendment Immunity Under Title IX

The Eleventh Amendment bars a State from being sued by a citizen of the State in federal court.[130] Since 1890, the Supreme Court has consistently held that this Amendment protects a State from being sued in federal court without the States consent. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 n.7 (1996)(cases cited). However, federal courts have jurisdiction over a State if the State has either waived its immunity or Congress has abrogated unequivocally a States immunity pursuant to valid powers. See id. at 68. Congress has unequivocally done so with respect to Title IX and related statutes.

In 1986, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, tit. X, ï½§1003, 100 State. 1845 (1986), to abrogate States immunity from suit for violations of Title IX, Section 504, Title VI, the Age Discrimination Act, and similar nondiscrimination statutes. See Lane v. Pena, 518 U.S. 187, 198 (1996) (court states in dicta that Congress intended to abrogate the States Eleventh Amendment immunity for purposes of Title IX). Section 2000d-7 states:

(1) A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. ï½§794, title IX of the Education Amendments of 1972 [20 U.S.C.A. ï½§1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. ï½§6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. ï½§2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

The Eleventh Amendment is no bar to actions brought by private plaintiffs under Title IX to remedy discrimination on the basis of sex. It is the position of the Department of Justice that Section 2000d-7 is an unambiguous abrogation which gives States express notice that a condition for receiving federal funds is the requirement that they consent to suit in federal court for alleged violations of Title IX and the other statutes enumerated. 42 U.S.C. 2000d-7 contains an express statutory abrogation of Eleventh Amendment immunity for Title IX suits. This abrogation is a valid exercise of Congress power under the Spending Clause to impose unambiguous conditions on States receiving federal funds. By enacting Section 2000d-7, Congress put States on notice that accepting federal funds waived their Eleventh Amendment immunity to discrimination suits under Title IX. In addition, Section 2000d-7 is a valid exercise of Congress power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. Under either power, the abrogation for Title IX suits is constitutional.

IX. Department of Justice Role Under Title IX

The Department of Justice has two roles to play in Title IX enforcement: coordination of federal agency implementation and enforcement, and legal representation of the United States and the funding agency. Pursuant to Exec. Order No. 12250, the Attorney General shall "coordinate the implementation and enforcement by Executive agencies" of Title VI, Title IX, Section 504 and "any other provision of federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance." Exec. Order No. 12250 ï½§1-201. Except for approval of agency regulations implementing Title IX and Title VI and the issuance of coordinating regulations, all other responsibilities have been delegated to the Assistant Attorney General for Civil Rights. While each federal agency extending federal financial assistance has primary responsibility for implementing Title IX with respect to its recipients, overall coordination in identifying legal and operational standards, and ensuring consistent application and enforcement, rests with the Civil Rights Division of the Department of Justice. In interpreting Title IX, the Department will look closely at, and coordinate and consult with, the Department of Education, the agency with the most Title IX experience and the agency with the regulations that served as the basis for the Title IX common rule.

As part of the Department of Justices Executive Order 12250 coordinating authority, the Civil Rights Division coordinated the drafting and publication of a common rule providing for the enforcement of Title IX by several participating agencies.[131] On October 29, 1999, the participating agencies published a Notice of Proposed Rulemaking to implement Title IX.[132] After receiving and reviewing comments, the agencies published the final Title IX rule on August 30, 2000.[133]

The Department of Justices second role is as the federal governments litigator. As discussed in Chapter VII, the Department of Justice, on behalf of Executive agencies, may seek injunctive relief, specific performance, or other remedies when agencies have referred determinations of noncompliance by recipients to the Department for judicial enforcement. Such litigation will be assigned to the Departments Civil Rights Division. In addition, the Department is responsible for representing agency officials should they be named in private litigation involving Title IX.

Footnotes

[1] In response to the Supreme Courts decision in Grove City College v. Bell, 465 U.S. 555, 571-72 (1984) that Title IX and other similar nondiscrimination statutes were program-specific and only applied to the particular portion of a recipients program that actually received federal financial assistance, Congress passed the Civil Rights Restoration Act of 1987 which clarified the definition of "program or activity" to cover all the operations of an entity receiving federal financial assistance. For example, if a State prison receives federal aid, all of the operations of the state Department of Corrections would be covered by Title VI and Section 504 and all of its education and training programs and activities would be covered by Title IX. 20 U.S.C. 1687.

[2] As discussed later in the Manual, however, there are Constitutional issues presented as well.

[3] See OCR Policy Determination, 43 Fed. Reg. 84 (1978), for a discussion of when this exception allows single-sex classes on grounds of religious belief.

[4] In implementing this provision, the Department of Education requires a single-sex school for both sexes once it is provided for one sex. The Department of Education is currently reviewing provisions in its current Title IX regulations regarding single-sex programs to determine whether revised standards or further guidance on this issue may be appropriate.

[5] See Chapter V(E) for a detailed discussion of this important grievance procedure requirement.

[6] As enacted in Title IX, this provision provides: (b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institutional to grant preferential or disparate treatment to members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other areas: Provided, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex. 20 U.S.C. ï½§1681(b).

[7] The Javitz Amendment was a compromise bill passed after congress rejected the Tower Amendment, an earlier proposal to either completely exclude intercollegiate athletics from Title IX or to exclude revenue-generating athletic programs. Pub. L. 93- 380, 88 Stat. 612 (1974). The HEW regulations are codified at 34 C.F.R. Part 106.

8 The Court in Grove City College held that federal student financial assistance provided to a college established Title IX jurisdiction only over the colleges financial aid program, not the entire college. This interpretation significantly narrowed the application of the prohibitions of Title IX and its counterparts, Title VI, the Age Discrimination Act of 1975, and Section 504.

9 See 7 C.F.R. Part 15a published on April 11, 1979; and 10 C.F.R. part 1040 published on June 13, 1980, respectively.

10 The participating agencies include: the Nuclear Regulatory Commission; Small Business Administration; National Aeronautics and Space Administration; Department of Commerce; Tennessee Valley Authority; Department of State; Agency for International Development; Department of Housing and Urban Development; Department of Justice; Department of Labor; Department of the Treasury; Department of Defense; National Archives and Records Administration; Department of Veterans Affairs; Environmental Protection Agency; General Services Administration; Department of the Interior; Federal Emergency Management Agency; National Science Foundation; Corporation for National and Community Service; and, the Department of Transportation. It should be noted that three agencies that participated in the Notice of Proposed Rulemaking the National Endowment for the Arts, the National Endowment for the Humanities, and the Institute of Museum and Library Services are promulgating separate Title IX regulations, rather than participating in the final Title IX common rule.

11 See 20 U.S.C. ï½§ 1681(a).

12 In Delmonte, the plaintiff alleged that he was demoted in 1990 on a prohibited basis in violation of Section 504. 877 F. Supp. at 1564. The court held that the defendant received federal financial assistance through its participation in at least 10 federal training programs (consisting of less than one to three-day programs) both before and after the demotion, over a course of approximately twelve years. Id. at 1565-66. The court does not clearly address whether its conclusion was based on training in the aggregate, or if a single training session (with the required contractual assurances of compliance with nondiscrimination), is sufficient. Id. at 1566.

13 Under the Title IX common rule, each federal agency that awards financial assistance is required to publish in the Federal Register a notice of the programs covered by Title IX. 65 Fed. Reg. 52874 ï½§ .600 (2000) .

14 It is often difficult to separate discussions of closely linked concepts, such as what is a recipient and what is federal financial assistance. Accordingly, the concept of "direct" and "indirect" are discussed both in terms of "direct/indirect recipient" and "directly receive/indirectly receive federal financial assistance."

15 "With the benefit of clear statutory language, powerful evidence of Congress' intent, and a longstanding and coherent administrative construction of the phrase 'receiving federal financial assistance,' we have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs." Id. at 569.

16 As stated by then-Deputy Attorney General Nicholas deB. Katzenbach to Hon. Emanuel Celler, Chairman, Committee on the Judiciary, House of Representatives (December 2, 1963):

> Activities wholly carried out by the United States with Federal funds, such as river and harbor improvements or other public works, defense installations, veteran's hospitals, mail service, etc. are not included in the list [of federally assisted programs]. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal 'assistance.' While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of Title VI.

110 Cong. Rec. 13380 (1964).

17 The court in Bob Jones Univ. distinguished pensions from payments to veterans for educational purposes since the latter is a program with a requirement or condition that the individual participate in a program or activity. 396 F. Supp. at 602 n.16. For a more detailed discussion of when assistance to a beneficiary may constitute indirect assistance to a recipient, see discussion of indirect recipient in section (B)(3) of this Chapter.

18 An ultimate beneficiary usually does not receive a "distribution" of the federal money. Rather, he or she enjoys the benefits of enrollment in the program.

19 Note that the written assurance may serve as the basis for a breach of contract action.

20It should be noted that the remaining text of this section distinguishes various scenarios for recipients and beneficiaries. While captions are used to separate different circumstances, courts do not uniformly use the same phrase to explain the same funding pattern. Thus, a court may refer to an "indirect recipient" when the situation more closely fits the paradigm of "primary recipient/subrecipient," as described in Section E of this chapter.

21 While the court's analysis in Grove City of the scope of "program or activity" was reversed by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), the Court's discussion of other principles, including direct and indirect recipients, remains undisturbed.

22 The Court in Smith did not address the Departments argument that "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient. Id. at 469-471.

[23] One district court has held that because the transfer of property in issue occurred before the effective date of Section 504 HUD regulations, the purchaser of the land was not considered a transferee with obligations under Section 504 but, instead, was merely a beneficiary of federal financial assistance with no obligations to comply with Section 504. Independent Hous. Servs. of San Francisco v. Fillmore Ctr. Assocs., 840 F. Supp. 1328, 1341 (N.D. Ca. 1993). However, it should be noted that the standard Office of Management and Budget assurance form used by most federal agencies includes language that requires recipients who enter into contracts to ensure that contractors comply with various antidiscrimination statutes, including Title IX. In addition, the language binding subsequent transferees, etc. has been in most Title VI regulations for over 30 years. Thus, recipients are aware of the fact that nondiscrimination statutes such as Title VI and Title IX, which are triggered by receipt of federal financial assistance, are binding on transferees, etc. Since Title IX is based on Title VI, the Title VI provisions on coverage of transferees are applicable to Title IX. Moreover, although most agencies Title IX regulations did not become effective until August 30, 2000, Title IX itself has been in effect since 1972. Thus, it is the Department of Justices view that Title IX statutory obligations are binding on all recipients, successors, transferees, assignees, and contractors who receive federal financial assistance, both before and after the date of the Title IX regulations, despite the one district court case cited above.

[24]The Graves court described the local agency as an "indirect" recipient since the federal money flowed "through another recipient," and compared this situation to Grove City College's indirect receipt of BEOG funds from students. Id. at 433. Given that the funding was distributed to a State agency and a portion allocated to a local entity, the more accurate description is that of primary/subrecipient.

[25] It should be remembered that federal assistance may include, not only, the payment of money to an ultimate beneficiary, but also the provision of subsidized services, e.g. job training, elementary and secondary education, prison job skills programs, etc.

[26] Title IX broadly defines the term "educational institution" to include "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education..." 20 U.S.C. ï½§ 1681.

[27]Throughout the remainder of this section, discussion of what constitutes a covered "education program or activity" and related references are intended to apply only to Title IXs scope of coverage outside traditional educational institutions.

[28]It should be noted that the 1984 House Report regarding an earlier version of the CRRA, which defined "recipient" rather than "program or activity," also described coverage as limited to "education." This description is instructive since sponsors of the CRRA, as eventually enacted, later noted that, despite the new language, coverage would operate in the same manner envisioned for the prior bill. Thus, it is worth noting that the 1984 House Report described Title IXs scope of coverage as follows:

An education recipient has a different scope of coverage depending upon whether the entity receiving federal funds has education as a primary purpose. If the recipient does have education as its primary purpose, such as colleges, universities, school districts, training institutes, and academies, then the federal funds result in institution-wide coverage. If the entity receiving federal funds does not have education as a primary purpose yet engages in educational functions, then all of its education-related functions are covered. For this entity, its other functions are not necessarily covered unless there is a link between the education function and the non-education functions.

H.R. Rep. No. 98-829, at 27.

[29]Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998); Grove City College v. Bell , 465 U.S. 555, 566 (1984); Cannon v. University of Chicago , 441 U.S. 677, 684-85 (1979); Cohen v. Brown Univ., 101 F.3d 155, 170 (1st Cir. 1996), cert denied, 520 U.S. 1186 (1997); Yusuf v. Vassar College, 35 F.3d 709, 714 (2 nd Cir. 1994). Indeed, one of the earlier legislative proposals of what ultimately became Title IX sought to amend Title VI itself by adding sex as one of its prohibited bases of discrimination. See North Haven , 456 U.S. at 546 (Powell, J., dissenting).

[30]However, as previously discussed, Title IXs coverage is limited to education programs and activities.

[31]U.S. Const., Art. I, ï½§8, cl. 1. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998); Smith v. Metropolitan Sch. Dist., Perry Township, 128 F.3d 1014, 1028 (7th Cir. 1997), cert. denied, 524 U.S. 951 (1988).

[32] Pederson v. Louisiana State Univ., 201 F.3d 388, 406 (5thCir. 2000), affd in part, revd in part, 213 F.3d 858 (5 th Cir. 2000). For a discussion of the scope of Congresss independent enforcement authority under Section 5 of the Fourteenth Amendment, see United States v. Morrison , ___ U.S. at ___, 120 S.Ct. 1749, 1755-59; Kimel v. Florida Bd. of Regents, 528 U.S. 62, 80, 120 S.Ct. 631, 644 (2000).

[33]Disparate treatment is also referred to as "intentional," "purposeful," or "invidious" discrimination.

[34]In many areas Title VII case law is also looked to for guidance in how to establish a Title IX violation.

[35]Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 (11 th Cir. 1993), rehearing denied, 7 F.3d 242 (11 th Cir. 1993), cert. denied, 502 U.S. 910 (1991), (quoting Williams v. City of Dothan, 745 F.2d 1406, 1414 (11 th Cir. 1984)).

[36] See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 726-730 (1982) (maintenance of single sex nursing school as compensation for assumed prior discrimination rejected as perpetuating sex stereotypes); United States v. Virginia, 518 U.S. 515, 534-46 (1996) (benign justification in defense of a categorical exclusion does not block inquiries into actual purposes of and factual support for the exclusion). It should be noted that both of these cases are Constitutional cases, not Title IX cases.

37 See Village of Arlington Heights v. Metro. Hous. Redevelopment Corp., 429 U.S. 252, 266-68 (1977)(evaluation of intentional discrimination claim under the Fourteenth Amendment); Elston, 997 F.2d at 1406.

38 See Baldwin v. University of Texas Med. Branch at Galveston, 945 F. Supp. 1022, 1031 (S.D. Tex. 1996), affd, 122 F.3d 1066 (5 th Cir. 1997); Brantley v. Independent Sch. Dist. No. 625, St. Paul Pub. Sch., 936 F. Supp. 649, 658 n.17 (D. Minn. 1996).

39 It is important to remember that the "prima facie case method established in McDonnell Douglas was never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1982) (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)).

For example, it should be noted that the McDonnell Douglas *prima facie* framework for Title VII claims does not require that the applicant selected for the position be of a different race, color, or national origin than the complainant. Under McDonnell Douglas, the complainant only needs to show that "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainants qualifications." McDonnell Douglas, 411 U.S. at 802. Several courts dealing with this issue in the Title VII context have noted that the fact that the applicant selected in place of the complainant is of a different race "may help to raise an inference of discrimination," but it is not necessarily dispositive on the question of discriminatory intent. Byers v. Dallas Morning News, Inc., 209 F.3d 419, 427 (5 th Cir. 2000) (internal citations omitted); see also Pivirotto v. Innovative Systems, Inc. *,* 191 F.3d 344, 354 (3 rd Cir. 1999); Jackson v. Richards Med. Co., 961 F.2d 575, 587 n.12 (6 th Cir. 1992).

40 See International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977); McDonnell Douglas, 411 U.S. at 802.

41 See Reeves v. Sanderson Plumbing Prod., Inc., __ U.S. __, 120 S. Ct. 2097, 2108 (2000) (finder of fact may infer the ultimate fact of discrimination from the falsity of an employers explanation); St. Marys Honor Ct. v. Hicks, 509 U.S. 502, 514 (1993) (burden on complainant to establish that challenged conduct "was the product of unlawful discrimination").

42 International Bhd. of Teamsters, 431 U.S. at 336.

43 Id.

44 Id. at 362.

45 See City of Los Angeles, Dept of Water and Power v. Manhart, 435 U.S. 702 (1978).

46 Disparate impact is also referred to as "disproportionate impact" or "adverse impact." Regardless of the descriptive phrase used, all refer to the process of evaluating facially neutral policies or practices that in fact result in the burdens of a policy or practice being borne more heavily by members of one sex(or race or national origin) than another.

47 Cohen v. Brown Univ., 101 F.3d at 172.

48 Guardians Assn v. Civil Serv. Commn, 463 U.S. 582, 584 (1983) (Title VI); Alexander v. Choate *,* 469 U.S. 287, 293 (1985) (Title VI); Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1253 (M.D. Ala. 1998), affd, 197 F.3d 484 (11 th Cir. 1999), cert. granted sub. nom. Alexander v. Sandoval, __ U.S. __, 121 S. Ct. 28, 2000 WL 718812 (U.S. Sep 26, 2000)(NO. 99-1908); Haffer v. Temple Univ., 678 F. Supp. 517, 539 (E.D. Pa. 1987)(Title IX).

49 New York Urban League v. New York *,* 71 F.3d 1031, 1036-40 (2 nd Cir. 1995) (incorporating the Title VII disparate impact analysis as part of an identical analysis under Title VI).

50 Guardians Assn v. Civil Serv. Commn, 463 U.S. 582, 584 (1983) (Title VI); Alexander v. Choate *,* 469 U.S. 287, 293 (1985) (Title VI).

51 See Larry P. v. Riles, 793 F.2d 969, 982 (9 th Cir. 1984); Elston, 997 F.2d at 1407 (citing Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11 th Cir. 1985)); Sharif v. New York State Educ. Dept, 709 F. Supp. 345, 361-62 (S.D.N.Y. 1989).

52 New York City Entl Justice Alliance (NYCEJA) v. Giuliani, 214 F.3d 65, 69 (2d Cir. 2000).

53 New York Urban League v. New York *,* 71 F.3d at 1037-38.

54 Georgia State Conference, 775 F.2d at 1417.

55 Board of Educ. v. Harris, 444 U.S. 130 (1979) ("educational necessity" analogous to "business necessity").

56 Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1253 (M.D. Ala. 1998), affd, 197 F.3d 484 (11 th Cir. 1999), cert. granted sub. nom. Alexander v. Sandoval, __ U.S. __, 121 S. Ct. 28, 2000 WL 718812 (U.S. Sep 26, 2000)(NO. 99-1908) quoting Elston, 997 F.2d at 1413).

57 Georgia State Conference, 775 F.2d. at 1418. See, e.g.*,* Elston, 997 F.2d at 1412-13.

58 See generally *,* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)

59 Sharif, 709 F. Supp. at 364.

60 Larry P. at 983.

61 Sandoval, 7 F. Supp. at 1312. See Meek v. Martinez, 724 F. Supp. 888 (S.D. Fla. 1987) (Floridas use of funding formula in distributing aid resulted in a substantially adverse disparate impact on minorities and the elderly). See also Campaign for Fiscal Equity, Inc. v. New York, 86 N.Y.2d 307, 655 N.E.2d 1178 (N.Y. Ct. App. Jun 15, 1995) (Prima facie case established where allocation of educational aid had a racially disparate impact); Sharif v. New York State Educ. Dept, 709 F. Supp. at 362 (Prima facie case established by statistical evidence and expert testimony showing that under-representation of women among scholarship winners not likely due to random distribution).

[62] See Elston, 997 F.2d at 1407.

[63] 71 F.3d at 1039.

[64] 922 F.Supp 544 (M.D. Ala. 1996).

[65] Id. at 551.

[66] Elston, 997 F.2d at 1407; see also Young by and through Young, 922 F.Supp at 551 (goals of addressing illegal recruiting and improving quality of schools were substantial legitimate justifications for policy imposing loss of athletic eligibility after interschool transfer, and plaintiffs failed to demonstrate existence of an equally effective alternative practice).

[67] See, e.g., Preston v. Com. Of Va. ex rel. New River Community College, 31 F.3d 203, 205-06 n. 2 (4 th Cir. 1994); Nelson v. University of Maine System, 923 F.Supp 275, 279-80 (D.Me. 1996); Clay v. Board of Trustees of Neosho Community College, 905 F.Supp. 1488, 1495 (D.Kan. 1995).

[68] See, e.g., 28 C.F.R. ï½§42.107(e) (Department of Justice Title VI Regulation).

[69] See, e.g., Benson v. Little Rock Hilton Inn, 742 F.2d 414, 416-17 (8 th Cir. 1984) (discussing remedial purpose of retaliation complaints and irrelevance of merits of underlying discrimination claim).

[70] One court in a private suit has read Title IX as prohibiting retaliation only for the exercise of personal rights. Holt v. Lewis, 955 F.Supp. 1385, 1389 (N.D.Ala. 1995), affd, 109 F.3d 771 (11 th Cir. 1997), cert. denied, 522 U.S. 817, 118 S.Ct. 67. But see, e.g., Trafficante v. Metropolitan Life Ins., 409 U.S. 205, 211 (1972) (white residence of apartment complex entitled to bring fair housing case based on discrimination against black applicants); Austen v. Hawaii, 759 F.Supp. 612, 627-28 (D.Ha. 1991), affd, 967 F.2d 583 (1991) (Title VII claim stated where evidence showed retaliation due to plaintiffs advocacy of womens issues); Maldonado v. METRA, 743 F.Supp. 563, 568 (N.D.Ill. 1990) (Title VII prima facie case stated where plaintiff had complained about discrimination against minorities generally).

[71] See North Haven v. Bell, 456 U.S. at 521, quoting United States v. Price, 383 U.S. 787, 801 (1966) (Title IX entitled to "a sweep as broad as its language.")

(1966) (Title IX entitled to a sweep as broad as its language.).

72 See, e.g., Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5 th Cir. 1969).

73 See David v. Halpern, 768 F.Supp. 968, 985 (E.D.N.Y. 1991).

74 This is not to say that the employment practices of a recipient of non-employment related assistance will always be beyond the reach of Title VI. Where such employment discrimination so infects the tone and tenor of a program or activity that it subjects beneficiaries to an oppressive discriminatory atmosphere, enforcement action under Title VI is authorized. See, e.g., 28 C.F.R. ï½§42.104(c)(2) (DOJ Title VI Regulations); 15 C.F.R. ï½§8.4(c)(2) (Commerce Title VI Regulations); 34 C.F.R. ï½§100.3(c)(2) (Education Title VI Regulations). See also, Ahern v. Board of Educ. of the City of Chicago, 133 F.3d 975 (7 th Cir. 1998); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 883 (5 th Cir. 1966), cert. denied, 389 U.S. 840 (1967).

75 See, e.g., North Haven v. Bell,456 U.S. 515, 537 (1982).

76 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (hereinafter referred to as "the Title IX common rule"), 65 Fed. Reg. 52858 (August 30, 2000), ï½§ _.500(a).

77 Johnson v. Baptist Med. Ctr., 97 F.3d 1070, 1072 (8 th Cir. 1996), rehearing denied, 114 F.3d 189 (8 th Cir. 1997). See also Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8 th Cir. 1996); Brine v. University of Iowa, 90 F.3d 271, 276 (8 th Cir. 1996), cert. denied, 519 U.S. 1149, 117 S.Ct. 1082; Doe v. Oyster River Co-Op Sch. Dist., 992 F.Supp. 467, 474 (D.N.H. 1997) (reference to Title VII provides helpful guidance). But see Chance v. Rice Univ., 984 F.2d 151 (5 th Cir. 1993), rehearing denied, 989 F.2d 179 (5 TH Cir. 1993) (claim of discrimination properly reviewed under the intentional discrimination standard of Title VI rather than the standards under Title VII).

78 29 C.F.R. ï½§1691.4. This provision is part of general regulations adopted jointly by the Department of Justice and the Equal Employment Opportunity Commission governing the handling of employment discrimination complaints received by federal funding agencies. Those general regulations are discussed more fully in subsection B.6 of this Chapter.

79 It is important to note, however, that Title VII case law does not apply with equal symmetry in the area of harassment claims. For a discussion of Title IX harassment claims, see section D of this Chapter.

80 See, e.g., Henschke v. New York Hosp.-Cornell Med. Ctr., 821 F. Supp. 166, 172-73 (S.D.N.Y. 1993).

81 See, e.g., Storey v. Board of Regents of the Univ. of Wisconsin, 604 F. Supp. 1200, 1205 (W.D. Wis. 1985).

82 See "Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal financial assistance." 28 C.F.R. ï½§ï½§ 42.601-42.613 (DOJ); 29 C.F.R. ï½§ï½§ 1691.1 - 1691.13 (EEOC).

83 See Title IX common rule ï½§ .500(a)(2) and (3); ï½§ .505.

84 See Title IX common rule, Subpart E, ï½§ï½§____.500-____.550.

85 See, e.g., Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991).

86 28 C.F.R ï½§ï½§42.601-42.613 (DOJ); 29 C.F.R. ï½§ï½§1691.1- 1691.13 (EEOC) (hereinafter cited as "Joint Complaint Procedures"). The Joint Complaint Procedures do not apply to complaints under Executive Order 11246 (which is enforced by the Office of Federal Contract Compliance Programs), the Omnibus Crime Control and Safe Streets Act, as amended, or the Juvenile Justice and Delinquency Prevention Act (which are enforced by the Departments Office of Justice Programs). Id. at ï½§42.601 and ï½§1691.1.

87 48 Fed.Reg. 3570(1983).

88 28 C.F.R. 42.605(a).

89 Id. at 42.605(b).

90 The phrase "special circumstances" is used throughout the Joint Complaint Procedures. In using this phrase, the Joint Complaint Procedures seek to recognize the need for administrative flexibility in processing complaints. For example, an agency might conclude that special circumstances argue in favor of retaining a complaint that ordinarily should be referred to the EEOC where the complaint was related to or in furtherance of a pending investigation of the same recipient.

91 In addition to Title IX, there are also Constitutional issues involved as discussed earlier in this Manual.

92 Recipients must ensure that equitable opportunities are provided for the receipt of scholarships by both the mens and womens athletic programs. See "Guidance on the Awarding of Athletic Financial Assistance," (OCR Letter to Bowling Green, July 23, 1998).

93 The following agencies also have Title IX regulations with similar requirements: The Department of Agriculture, 7 C.F.R. part 15a; the Department of Energy, 10 C.F.R part 1040; and the Department of Health and Human Services, 45 C.F.R. part 86.

94 The Department of Education regulations differ slightly by requiring an assurance each time an application is made. See 34 C.F.R. ï½§106.4(a).

95 This does not apply to recipients that are exempted from the admissions provisions in Subpart C of the Title IX regulations e.g., private undergraduate institutions and military schools. 34 C.F.R. ï½§106.9(a).

96 The Department of Education regulations require that the notice also be published in local newspapers. 34 C.F.R. ï½§106.9(2)(i). The Title IX common rule does not include this requirement.

97 This document was issued pursuant to the Assistant Attorney General authority under Executive Order 12250. This Order charges the Attorney General with with the responsibility for ensuring for the consistent and effective implementation of various laws prohibiting discriminatory practices in federal programs and programs receiving federal financial assistance, including Title IX among other statutes. The Attorney Generals authority under the Executive Order, except for the approval of regulations, was delegated to the Assistant Attorney General for Civil Rights. 28 C.F.R. ï½§0.51.

98 See Chapter VI, Section A for a detailed discussion of assurances of compliance with Title IX.

99 The Title VI Guidelines distinguish between the applicability of an agency's deferral authority for initial or one-time awards versus continuing, periodic awards. The Title VI Guidelines state that agencies have deferral authority with regard to "applications for one-time or noncontinuing assistance and initial applications for new or existing programs of continuing assistance." 28 C.F.R. ï½§ 50.3 II.A. In contrast, if an application for funds has been approved and a recipient is entitled to "future, periodic payments," or if "assistance is given without formal application pursuant to statutory direction or authorization," distribution of funds may not be deferred or withheld unless all the Title VI statutory procedures for a termination of funds are followed. Id. II.B.

The Title VI Guidelines do not specify what may constitute "abnormal" or exceptional circumstances to warrant deferral of a continuing grant. In these renewal or continuation situations, the Title VI Guidelines indicate that an assurance of compliance or a nondiscrimination plan may be required prior to continuing the payout of funds.

100 Subsequent to the adoption of Title VI, Congress on at least two occasions has refused to prohibit agencies from exercising pre-award deferral authority. In 1966, in considering the Elementary and Secondary Education Amendments of 1966, the House adopted a provision that effectively would have prohibited pre-award deferrals of certain education grants by the Department of Health, Education, and Welfare. The amendment, offered by Representative Fountain, provided that no deferral could occur unless and until there was a formal finding, after opportunity for hearing, that the applicant was violating Title VI. 112 Cong. Rec. 25,573 (1966). Representative Fountain argued that a deferral was the same as a refusal, and accordingly that deferrals should be subject to the same hearing procedure required to refuse or terminate assistance. Id. at 25,573-74. In opposition, Representative Celler argued that the amendment would preclude HEW from obtaining pre-award relief since the award procedure would be completed before the Title VI hearing could be held. Id. at 25,575. During the debate, Rep. Celler noted that HEW was acting pursuant to the directives set out in the Title VI Guidelines. Id. The Senate version did not include any limitation on deferrals. In conference, the prohibition was deleted and replaced with a durational/procedural limitation on certain HEW deferrals. Conf. Rep. No. 2309, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 3896. Codified at 42 U.S.C. ï½§ 2000d-5. Again in 1976, in adopting the Education Amendments of 1976, Congress imposed a durational/procedural limitation on HEW deferral authority, codified at 20 U.S.C. 1232i(b), but rejected a House passed amendment effectively prohibiting specified HEW deferrals. 122 Cong. Rec. 13411-13416; H.R. Conf. Rep. No. 1701, 94th Cong., 1st Sess. 242-43 (1976), reprinted in 1976 U.S.C.C.A.N. 4943-44. This post-adoption legislative history buttresses the conclusion that deferrals are an appropriate application of the pre-award remedial authority granted agencies by Congress. See Board of Pub. Instruction of Palm Beach County, Fla. v. Cohen, 413 F.2d 1201 (5th Cir. 1969).

101 The Title VI Guidelines note that deferral may be more appropriate where it will be difficult during the life of the grant to obtain compliance, e.g., where the application is for noncontinuing assistance. On the other hand, deferral may be less appropriate where full compliance may be achieved during the life of the grant, e.g., where the application is for a program of continuing assistance. Where the grant of assistance is not deferred despite a concern about noncompliance, the Title VI Guidelines advise that

the applicant should be given prompt notice of the asserted noncompliance; funds should be paid out for short periods only, with no long-term commitment of assistance given; and the applicant advised that acceptance of the funds carries an enforceable obligation of nondiscrimination and the risk of invocation of severe sanctions, if noncompliance in fact is found. Id. II.A.2.

102 In the alternative, a federal agency may obtain assurances directly from subrecipients, if it so chooses.

103 As discussed earlier, the Title IX Common Rule and this Manual do not cover the Department of Education and its recipients, which have long been subject to the Department of Educations Title IX regulations and guidance. Nor are preaward reviews and related requirements delegable to the Department of Education absent its consent.

104 A further refinement would involve agencies sharing their lists of potential grantees with other agencies, as appropriate.

105 For example, pre-award reviews would not be necessary for applications that are unlikely to be funded for programmatic reasons.

106 Post-award reviews may be limited to a "desk audit," i.e., a review of documentation submitted by the recipient, or may involve an on-site review. In either case, an agency will demand the production of or access to records, and this discussion addresses the limits on an agency's demand for such records.

107 See Title VI Coordination Regulations, 28 C.F.R. ï½§ 42.407(c).

108 Each federal agency participating in the Title IX common rule published a provision adopting the Title VI procedures. See, e.g., Department of Education Title IX regulation at 28 C.F.R. ï½§54.605.

109 See, e.g., Department of Justice Title VI Regulations, 28 C.F.R. ï½§ 42.107(a).

110 As mentioned above, it is assumed that the first two factors can be established. First, that the access provision is an appropriate exercise of agency authority to issue regulations consistent with the statute. Second, it is assumed that any data sought will be relevant to an evaluation of whether the recipient's employment practices or delivery of services are discriminatory.

111 An agency may wish to consider involving the block grant recipient (generally, a State agency) in the compliance review and in any subsequent negotiations to resolve identified violations.

112 "All Federal staff determinations of Title VI, (as well as Title IX) compliance shall be made by, or be subject to the review of, the agency's civil rights office." 28 C.F.R. ï½§ 42.407(a). Where regional or area offices of federal agencies have responsibility for approving applications or specific projects, the agency shall "include personnel having Title VI review responsibility on the staffs" of these offices. These personnel will conduct the post-approval compliance reviews. Id.

In this era of downsizing, it is understood that not all field offices will have Title IX staff. This element of review, however, should be conducted and reviewed by experienced Title IX personnel, whether as a full time or collateral duty, and whether or not as members of the office in issue.

113 The discussion herein applies primarily to post-award enforcement. Subsections address the extent to which enforcement may vary in a pre-award context.

114 In considering options for enforcement, agencies should consult the Title VI Guidelines. 28 C.F.R. ï½§ 50.3.

115 Agencies are strongly encouraged to make use of alternative dispute resolution (ADR), whenever appropriate. Both the President and the Attorney General have encouraged the use of alternative dispute resolution in matters that are the subject of civil litigation. See Executive Order 12988 and Attorney General Order OBD 1160.1. The Administrative Dispute Resolution Act of 1996 authorizes the use of ADR to resolve administrative disputes. 5 U.S.C. ï½§ 571 et seq.). ADR can consist of anything from the use of a neutral third party or mediator to informally resolving a matter without completing a full investigation.

116 Where voluntary compliance is achieved, the agreement must be in writing and specify the action necessary for the correction of Title VI or Title IX deficiencies. 28 C.F.R. ï½§ 42.411(b).

117 Although Title VI (and, thus, Title IX), do not provide a specific limit to the time period within which voluntary compliance may be sought, it is clear that a request for voluntary compliance, if not followed by responsive action on the part of the institution within a reasonable time, does not relieve the agency of the responsibility to enforce Title IX by one of the two alternative means contemplated by the statute. A consistent failure to do so is a dereliction of duty reviewable in the courts. 28 C.F.R. ï½§ 42.411(b).

118 One example of language currently used by the Department of Justice's Office of Justice Programs is as follows:

In reviewing an application for funding, we consider whether the applicant is in compliance with federal civil rights laws. A determination of noncompliance could lead to a denial of assistance or an award conditioned on remedial action being taken. We are aware that the Department's Civil Rights Division is conducting an investigation involving possible civil rights violations. The Civil Rights Division has advised us that your agency is cooperating with its investigation, and we have taken that into account in deciding to approve your grant application.

119 See, e.g., 24 C.F.R. ï½§ 1.8(d) (HUD); 29 C.F.R. ï½§ 31.8(c) (Labor).

120 For example, HUD regulations require that the agency continue negotiations for ten days from the date of mailing the notice of noncompliance to the recipient. Id.

121 The congressional intent behind the 30 day requirement was to include seemingly neutral third parties, (the relevant Congressional committees), to ensure that the decision to terminate funds was fair, reasoned, and not arbitrary. See 110 Cong. Rec. 2498 (1964) (Statement of Cong. Willis); 110 Cong. Rec. 7059 (1964) (Statement of Sen. Pastore).

122 Much of the legislative debate on Title VI centered on the potential scope of any termination of assistance due to a failure to comply with the rules effectuating Section 601. The Dirksen-Mansfield substitute bill, which was developed through informal, bipartisan conferences, sought to answer those concerns. For a listing and explanation of specific changes made by the substitute see, 110 Cong. Rec. 12817-12820 (1964) (Report of Senator Dirksen). Senator Humphrey explained the purpose behind the substitute language.

Some Senators have expressed the fear that in its original form Title VI would authorize cutting off of all federal funds going to a state for a particular program even though only part of the state were guilty of racial discrimination in that program. And some Senators have feared that the title would authorize canceling all federal assistance to a state if it were discriminating in any of the federally-assisted programs in that State.

As was explained a number of times on the floor of the Senate, these interpretations of Title VI are inaccurate. The title is designed to limit any termination of federal assistance to the particular offenders in the particular area where the unlawful discrimination occurs. Since this was our intention, we have made this specific in the provisions of Title VI by adding language to 602 to spell out these limitations more precisely. This language provides that any termination of federal assistance will be restricted to the particular political subdivision which is violating non-discriminatory regulations established under Title VI. It further provides that the termination shall affect only the particular program, or part thereof, in which such a violation is taking place.

110 Cong. Rec. 12714-12715 (l964); see, 110 Cong. Rec. 1520 (1964) (Celler); 110 Cong. Rec. 1538 (1964) (Rodino); 110 Cong. Rec. 7061-7063 (1964) (Pastore).

123 The court noted that each of the grant statutes affected by the order was denominated "a program" by the terms of its own statutory scheme.

124 The court also quoted Senator Long from the debate on passage of the Act:

Proponents of the bill have continually made it clear that it is the intent of Title VI not to require wholesale cutoffs of Federal [f]unds from all Federal programs in entire States, but instead to require a careful case-by-case application of the principle of nondiscrimination to those particular activities which are actually discriminatory or segregated.

Id. at 1075 (quoting 110 Cong. Rec. 7103 (1964)).

125 The WEAL II decision brought to a close sub nom. the twenty year history of litigation that began in 1970 under Adams v. Richardson, 356 F.Supp. 92 (D.D.C. 1973), a suit that challenged the Department of Health, Education, and Welfares dereliction in enforcing Title VI.

126 In this case, plaintiffs brought suit to enjoin the Department of Education from allowing recipients of its funds to offer certain federally funded scholarships exclusively to minorities. 983 F.2d at 486.

127 The Court further stated, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Id. at 70-71.

128 The Court examined congressional intent expressed both prior to and after its decision in Cannon. When Title IX was enacted, Congress was silent on the subject of a private right of action, but the Court noted that Congress acted in the context of the prevailing presumption in favor of all available remedies. Id. at 72. Following Cannon, Title IX (and Title VI, Section 504, and the Age Discrimination Act) were amended on two occasions, and neither action evidenced congressional disagreement with this presumption. Id. at 72-73. First, Congress added 42 U.S.C. ï½§2000d-7 through the Rehabilitation Act Amendments of 1986, to abrogate the States Eleventh Amendment immunity in suits under these statutes. Second, Congress added 42 U.S.C. ï½§2000d-4a under the Civil Rights Restoration Act of to restore the broad scope of programs covered by these statutes.

129 The Court explained that the problem with "permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." Id. at 74. The notice problem is a function of the consensual nature of an entitys decision to accept federal funds and the conditions attached to their receipt. The entity weighs the benefits and burdens before accepting the funds, including the nondiscrimination obligations that attach to the funding. The concern is that where the violation is unintentional, particularly if it is a "disparate impact" violation, the recipient may not have been sufficiently aware at the time the funds were accepted that the nature and scope of the nondiscrimination obligation included a prohibition on the specific behavior subsequently found to constitute unlawful discrimination. Accordingly, responsibility for money damages may not have been foreseen. See id.; Guardians, 463 U.S. at 596-597 (White, J., joined by Rehnquist, J.); Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

130 U.S. Const. Amend XI states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." See Hans v. Louisiana, 134 U.S. 1, 11 (1890).

131 The participating agencies include: the Nuclear Regulatory Commission; Small Business Administration; National Aeronautics and Space Administration; Department of Commerce; Department of Labor; Tennessee Valley Authority; Department of State; Agency for International Development; Department of Housing and Urban Development; Department of Justice; Department of Labor; Department of the Treasury; Department of Defense; National Archives and Records Administration; Department of Veterans Affairs; Environmental Protection Agency; General Services Administration; Department of the Interior; Federal Emergency Management Agency; National Science Foundation; Corporation for National and Community Service; and, the Department of Transportation.

132 See 64 Fed. Reg. 58567 (1999). Three agencies that participated in the Notice of Proposed Rulemaking, the National Endowment for the Arts, the National Endowment for the Humanities, and the Institute of Museum and Library Services are promulgating separate Title IX regulations, rather than participate in the final Title IX common rule.

133 See 65 Fed. Reg. 52858 (2000).

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Yes No